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1. Chapter Tables - 24.

TRIAL

OF

WILLIAM BURKE

AND

HELEN M'DOUGAL,

BEFORE THE

HIGH COURT OF JUSTICIARY,

AT EDINBURGH,

ON WEDNESDAY, DECEMBER 24. 1828,

FOR

THE MURDER OF

MARGERY CAMPBELL, OR DOCHERTY.

TAKEN IN SHORT HAND BY MR JOHN MACNEE, WRITER.

WITH AN ILLUSTRATIVE PREFACE. ALSO, PORTRAITS OF BURKE, M'DOUGAL, AND HARE,—VIEW OF THE INTERIOR OF BURKE'S HOUSE, PLAN OF THE PREMISES, &c.

" —— *Specus et Caci detecta apparuit ingens*
Regia, et umbrosæ penitus patuere cavernæ. "
ÆNEID, LIB. VIII.

" The Court of Cacus stands reveal'd to sight;
The cavern glares with new admitted light. "
DRYDEN'S VIRGIL, BOOK 8.

EDINBURGH:

ROBERT BUCHANAN, 26, GEORGE STREET; WILLIAM HUNTER, 23, HANOVER STREET; JOHN STEVENSON, 87, PRINCES' STREET; AND BALDWIN & CRADOCK, LONDON.

MDCCCXXIX.

NEW YORK

ADVERTISEMENT.

THIS Report of a Trial for Murder, which, from the peculiarity of the motives for, and the extraordinary circumstances connected with, and under which, the crime was perpetrated;—has excited the greatest sensation in the minds of the Public, and, for atrocity and singularity, stands unparalleled in the annals of any country; has been prepared in a way which enables the Publishers to affirm, that the utmost reliance may be placed on its Completeness and Accuracy. The Opinions of the learned Judges who presided, and the Speeches delivered by the eminent Counsel for the Crown and the pannels, have been BY THEM MOST OBLIGINGLY AND CAREFULLY REVISED; and the whole of the Evidence is given *verbatim*, both Question and Answer. To this edition, Portraits of the criminals Burke and M'Dougal, and of Hare their guilty associate, are prefixed,—taken in Court during the Trial by an EMINENT ARTIST, and acknowledged to be *correct and striking Likenesses*. The View of the Interior of Burke's House, as it appeared on the day after the trial, is given from a sketch made with the greatest care, and the Plan of the Houses in Wester Portsburgh, and places adjacent, including the premises occupied by Burke and Hare, has been reduced from that drawn by Mr James Braidwood, builder, and produced in Court. The fac-simile of Burke's handwriting, is correctly traced, from his signature to his first declaration, dated 3d November 1828.

EDINBURGH,
16th January 1829.

ERRATA IN THE FIRST EDITION.

Page xiv. line 3 of preface, *for* her, *read* she.
— 10, line 12, *after* hesitate, *add* about.
— 43, — 33, *for* Lord Advocate, *read* Lord Pitmilly.
— 48, — 11, *for* the month of November last, *read* last harvest.
— 48, — 28, *after* came, *add* a point of interrogation.
— 51, — 30, *after* name, *add*, and she said it was Docherty.
— 61, — 1, *for* voice, *read* noise.
— 64, — 7, *the answer to the question*, 'Was the outer door shut? *should be*, I was not so far forward as to see that; it appeared to me that it was on that door the woman struck. It was on the door of the passage, *not* the door of the room.
— 64, — 28, *after* voice, *add*, of the woman.
— 64, — 33, *for* were, *read* was.
— 67, — 20, *for* me, *read* him.
— 68, — 15, *for* men, *read* women.
— 75, — 22, *for* a nod, *read* an oath.
— 79, — 41, *after* death, *add the answer*, No, she said nothing.
— 82, — 36, *delete* morning.
— 85, — 18, *for* man, *read* men.
— 87, — 12, *add the following question and answer*—Was the body shown to the prisoners? Yes.
— 87, — 18, for petticoat, *read* bag or pillow case.
— 93, — 30, *for* and his aunt lying behind them, *read* who was lying behind them, next his aunt.
— 94, — 30, *for* it, *read* the body.

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C. The dark mark near C represents the appearance of blood on the floor of Burke's House.

D. House possessed by Mrs Connoway.

E. House possessed by Mrs Law.

F. F. F. F. The dotted line on which the four letters F are placed, shews the passage from the Street, and Flat above, and corresponds with the passage in the Sunk Floor.

G. Steps and door to Back Court.

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O. O. O. Private passage to Burke's House.

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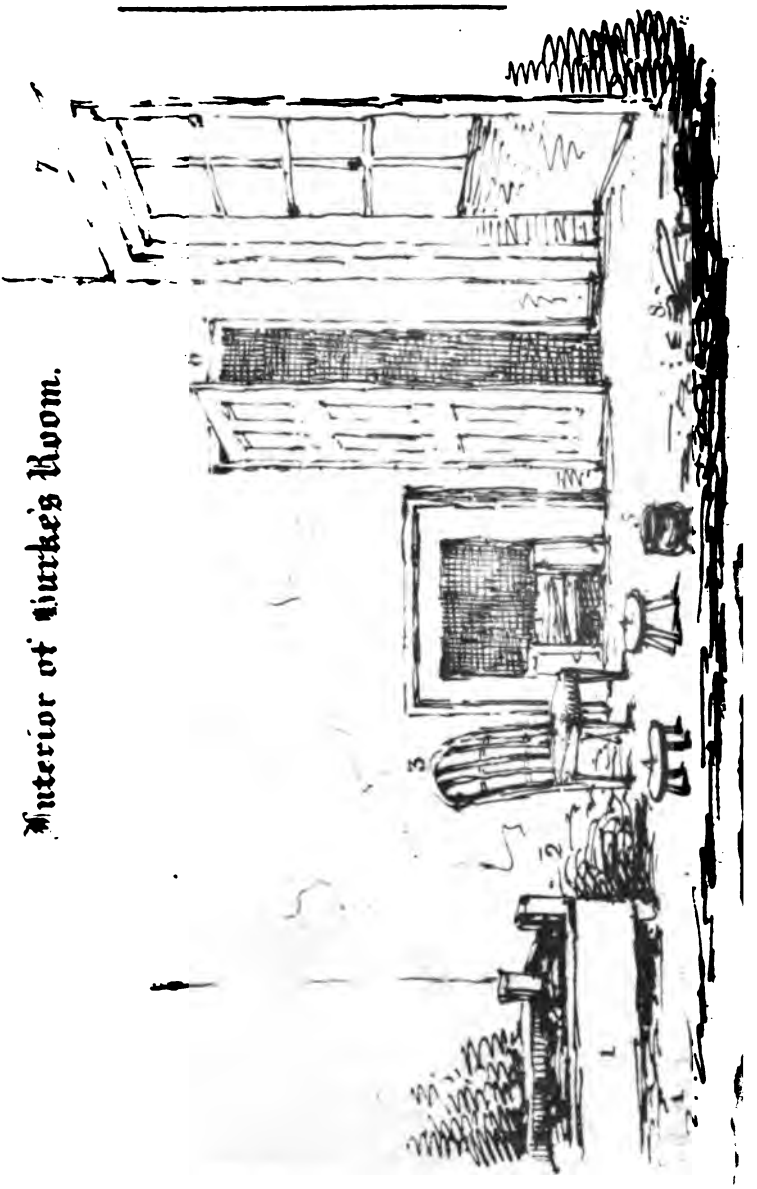
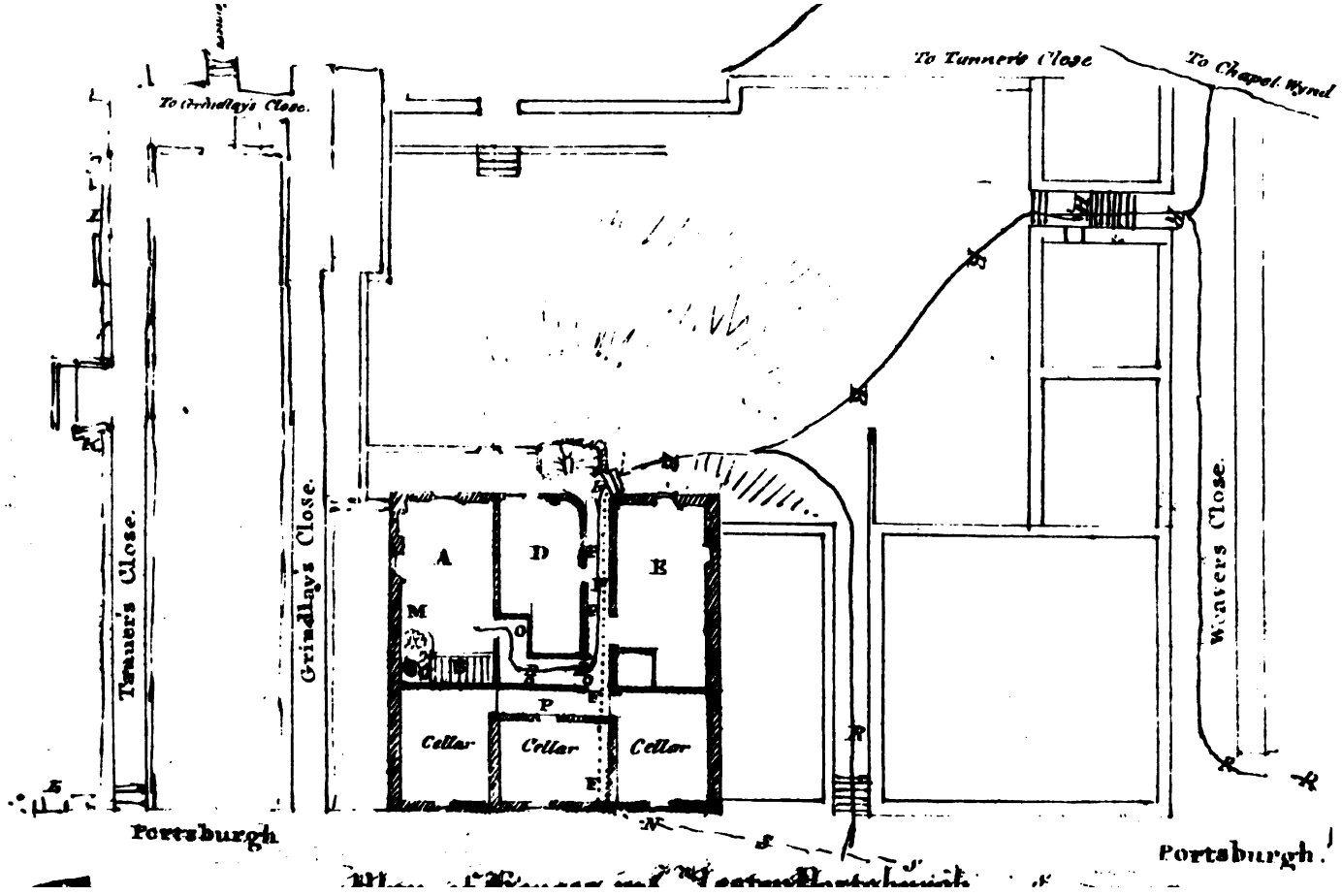
R. R. R. R. The strong line marked with the letter R shews the different entries to Burke's House.

Signature.

Wm Burke



Interior of Burke's Room.


To Grindlay's Close.
To Tanner's Close
To Chapel Wynd
Tanner's Close.
Grindlay's Close.
Weavers Close.
A
D
E
M
O
P
Cellar
Cellar
Cellar
Portsburgh
Portsburgh.

PREFACE.

The following trial is a dreadful proof of the deep depravity of human nature, and no criminal case, as far as we know, can make any parallel to it—it stands alone in the annals of murder—even the legends of Sawny Beane, and of Maugraby, the eastern magician, fade before its complicated atrocity.

To the poorer classes in Edinburgh, and elsewhere, it may afford a very useful lesson; for it is reported that the victims who fell a sacrifice to Burke and his accomplices, were enticed to their tragical end by the present of spirituous liquors, which rendered them passive in the clutches of their butchers. It is too certain, that the use of whisky, in this town at least, is prevalent beyond example—and that the older parts of the city, even in mid-day, exhibit scenes that rival Hogarth's Gin Lane, or the beastly orgies of the ancient Scandinavian savages. If opiates also were administered, as is generally believed, still people are to consider, that a proper quantity of *pure* whisky will do quite as well; and that this *aqua toffana*, however it be strengthened or diluted, will eventually work to the very worst of all hellish purposes.

In this affair there has been a clamour raised against medical men, we hope on no just foundation, as subjects must be had to lecture upon, or the most useful of sciences must die; and, unfortunately, human prejudices as to sepulture are so strong, that great difficulties occur in procuring bodies for dissection. For this there would be an easy remedy, did not human pride and self-conceit interpose an almost insuperable barrier. If people would cancel the silly codicils in their wills, as to rings and locks of hair, and ten thousand baubles, frequently left to those who thought the testator a bauble, or cordially hated him; if they could forget gorgeous

monuments, to be reared over every worthless dust,* and laudatory epitaphs, that are frequently, if rightly taken, the most bitter of all satires—and bequeath their bodies to the public for dissection, they might have the merit of being for once useful to their fellow creatures, and of turning to advantage a miserable carcase, their own eternal study, and frequently their torment; for the ease of which their families perhaps have been made wretched, and their servants slaves—for which the elements have been ransacked, to pamper a gorged and queasy stomach, and numberless other vices fostered, the darlings of idleness and of wealth. To the more refined of the female sex, however, this should be unpalatable doctrine—for a woman must have little modesty, who can bear the idea of such an exposure, even after her decease—

> "Say, would thy heart no deathlike torture feel,
> To see my limbs the felon's gripe obey;
> To see them gash'd beneath the daring steel,
> To crowds a spectre, and to dogs a prey?"—*Shenstone.*

But the poor-house, and the gallows, from whence all who suffer should be dissected, may make up for this deficiency.

Of the criminal who is shortly to suffer the last doom of the law, little, save his late atrocities, is known with certainty. Burke is a native of Ireland; and the woman (Helen M'Dougal) who goes under the name of his wife, was born, unfortunately for the credit of this country, in Scotland. It is said that no marriage ever took place between them, and that she eloped from her last husband to follow the fortunes of Burke, who had relations in this town—

> "To Pharos with her wandering love she fled,
> To show one monster more than Afric bred."—*Juvenal.*

They both subsisted for some time partly by trafficking in pedlary ware, partly by carrying on a petty trade of various

---

* "Such are those thick and gloomy shadows damp,
Oft seen in charnel vaults and sepulchres,
Ling'ring and sitting by a new-made grave,
As loath to leave the body that it lov'd,
And link'd itself by carnal sensuality
To a degenerate and degraded state."—*Milton.*

descriptions — when, all of a sudden, Mrs. Burke appeared better clothed than ordinary, and her husband to have money at command. This was about a twelvemonth ago, when the system of murder, or at least, of rifling the churchyards, had commenced. In a short time, the couple hired an obscure house in the West Port of Edinburgh, well calculated, from its situation, for their bloody traffick. In this place, he ostensibly continued a trade of shoemaking or cobbling; and here, occasionally, took place meetings of the most vicious of both sexes: dancing, and midnight brawls,—and screams were so frequently heard, during the silence of night, issuing from the apartments of Burke, that the neighbours at last paid little attention to the nuisance, and were with reluctance roused from their beds by the cries of the old woman, whose death has brought the murderer to justice.

The first victim mentioned in the indictment, Mary Paterson or Mitchell, was a person of disorderly life, and is said to have been well known to Burke before he murdered her. She was of low stature, and not calculated to make much resistance, even had the opiates been withheld. She was cut short in her sinful career, and hurried (O, dreadful thought—how much unprepared!) before the judgment-seat of her offended Maker, at the early age of twenty-one.

The next victim was happier, as he could have no sins to answer for. He was a well-known figure in Edinburgh, particularly in the old town,—we mean James Wilson, commonly called *Daft Jamie*. This innocent creature had been insane from his infancy, but was perfectly harmless, as his malady partook more of idiotism than of madness. He possessed features not unpleasing, and a tuneful voice in singing, which made him many friends—thus nature sometimes seems inclined to compensate for her utmost cruelties—and though he never would wear shoes, stockings, or a hat, he was very particular as to his linen, which he changed thrice a week. The Burkes, and their infamous accomplices, it is said, decoyed him into their accursed shambles by the offer of snuff, to which, like the generality of these unfortunate beings, he was greatly attached;* but when there, they could not pre-

* The snuff-box mentioned in the indictment was his property.

vail upon him, either by entreaty or menaces, to taste their drugged liquor,* and his struggles had nearly overpowered them, as he was a stout lad, only eighteen. His face, so familiar to every eye, was studiously disfigured before he was offered to the surgeons.

The scene of his murder seems much unadapted to concealment. After descending a few steps into a very narrow close, the rooms which Hare occupied on the ground floor, are so near the abode of many, that it was next to impossible that his cries and struggles should not have been heard. But amid such eternal drunkenness and riot, every noise is unheeded. The day after the trial, these dens appeared totally deserted of furniture,—a truss of old straw alone remained in one corner; and the broken windows testified either the disorders of the late inhabitants, or a more recent popular feeling.

Burke's house, which is in a *land* hard by, appears to have been purposely chosen for the safe perpetration of crime. After descending a common stair, and turning to the right, a passage conducts to the door, from which a dark *trance* leads to the room where the old woman was murdered. This room is so small, that the women who pretended to feel some alarm while Burke was stifling his prey, must have stept over them to escape. The day after the trial, every thing seemed in the same position as when the culprits were first arrested. A crazy chair stood by the fire place, near two broken wooden stools—old shoes, and implements for shoe-making lay scattered on the floor—a pot full of boiled potatoes, and broken glass, with old rags and straw, were near a cupboard, on which were some plates and spoons—the bed, if such it may be called, exhibited a disgusting spectacle; it is a

* It has been stated in one of the newspapers, that they at *last* induced him to take a little whisky, and soon after found no difficulty in prevailing upon him to take a quantity sufficient to produce intoxication. In this condition he lay down on the floor, and soon fell asleep; when Burke, who had been anxiously watching for this opportunity, pounced upon him, and attempted to suffocate him. Jamie, roused by this sudden attack, sprang up, and a desperate struggle ensued. Fighting with the united frenzy of madness and despair, he had nearly overpowered Burke, who then called on Hare to assist him. Hare immediately rushed to his aid, and by tripping up his heels, they, with the utmost difficulty, succeeded in depriving him of existence by stifling him. Both Burke and Hare, it is said, bear the marks of his desperate resistance.—PUBLISHERS' NOTE.

coarse wooden frame, without posts or curtains, and was filled with old straw and rags, among which a man's shirt, stained with blood in front, and something like a child's shift, also bloody, were plainly discernible. At the foot of the bed, between it and the wall, was the heap of straw under which the woman's body was concealed. The bed stood so near the wall, that the corpse must have been doubled up, to be hidden after the murder.

At the foot of the common stair is a door opening into a large yard, or piece of waste ground, across which the bodies from the slaughter-house are said to have been conveyed to a cellar adjacent. *Let those who possess such cellars, be cautious in future to what use they are appropriated.*

Constantine Burke's Room in the Canongate, where Mary Paterson or Mitchell was stifled, is also of a most miserable description. Ascending a narrow wooden trap-stair, and going along a passage, you find a door, only fastened by a latch, opening into an apartment, in which were a truckle bed, and another with tattered patch-work curtains; the walls adorned with many tawdry prints, carefully nailed on. Here, according to information, the first murder was perpetrated; but from the long residence of the brothers in Edinburgh, and from common report, this point for the present remains exceedingly doubtful.

When the criminals were brought to trial, every precaution was adopted to preserve the public peace, and facility of access to those whose duty required their attendance; the high constables of the city and its dependencies were ordered to muster at six o'clock in the evening; and the police received a temporary reinforcement of upwards of 300 men. The prisoners were brought, early in the morning, from the Caltonhill jail, and when produced at the bar, made a very squalid appearance. Burke is a stout, middle-sized man, with a determined visage, that seemed unawed by all around him. The accomplice of his black crimes has never possessed any beauty,* and only at times shewed some sense of her perilous situation. Strange to say, she escaped the just doom of the law, by the verdict of a respectable jury; and stranger, that the audience, whose natural prejudices were supposed

* She appears to be considerably older than her paramour, probably ten or twelve years.

to be strong in dislike of the prisoners, charmed by an overpowering eloquence, were scarcely restrained from proving, by their loud applause, the ingenious vindication of this most wicked and most inexcusable of murderesses!

The tragedy is now drawing to a close; but it is very likely, *from strong presumptions*, that many more of the same horrid kind may ensue. Let the lower classes then, in Edinburgh, "be sober, be vigilant." Let the higher set them an example in both —and as for the medical men, nothing in this case can possibly affect them; though after such an affair, vulgar prejudice may for a time class them with cannibals and banditti, who use choke pears, opiates, poisons, the wet cloth, and *a certain acid*, to procure what is indispensable to their profession, they may despise the unfounded clamour—yet let them not remit in their caution as to their dangerous purchases, nor trust at all to their unprincipled purveyors—"lest a worse thing befal them."

As public curiosity must naturally be excited concerning any circumstance in our Scottish records, having connexion, however remote, with this shocking affair, the following extract is subjoined, taken from Lord Fountainhall's MS. in the Library of the Faculty of Advocates:—

"6 *Februarii* 1678.—Four Ægyptians of the name of Shaw were this day hanged, the father and three sones, for a slaughter committed by them of on of the Faws (another tribe of these vagabonds, worse than the *mendicantes validi* mentioned in the code), in a drunken squabble, made by them in a randevouz they had at Romanno, with a designe to unite their forces against the clans of Browns and Bailzies, that were come over from Ireland to chasse them back again, that they might not share in their labors; but in their ramble they discorded, and committed the foresaid murder, and sundry of them of both sydes ware apprehended.

"Thir four being throwen all unto on hole digged for them in the Grayfrier Church Yeard, with their clothes on; the nixt morning the youngest of the three sones (who was scarce sixteen) his body was missed, and found to be away. Some thought he being last thrown over the ladder, and first cut downe, and in full vigor, and no great heap of earth, and lying uppermost, and so not so ready to smother, the fermentation of the blood, and heat of the bodies under him, might cause him rebound and throw off the earth, and recover ere the morning, and steall away; which, if true, he deserves his life, tho' the magistrats, or their bourreau, deserved a reprimande; but others, more probably, thought his body was stolen away by some chirurgeon, or his servant, to make ane anatomicale dissection on; which was criminal to take at their owne hand, since the magistrats would not have refused it; and I hear the chirurgeons affirme, the towne of Edinburgh is obliged to give them a malefactor's body once a year for that effect, and its usual in Paris, Leyden, and other places to give them; also some of them that dyes in hospitals."—*Fountainhall MS.*

The following broadside is reprinted for the reason mentioned above. To such doggerel, and to all their other accusations of a like nature, the doctors might give a conclusive answer in the hackneyed adage—"*necessitas non habet legem.*"

"*An Account of the most horrid and unchristian actions of the Gravemakers in Edinburgh, their raising and selling of the Dead, abhorred by Turks and Heathens, found out in this present year* 1711, *in the Month of May.*

"Dear Friends and Christians, what shall I say,
Behold, the dawning of the latter day
Into this place most bright casts forth its rays—
The like was never seen by mortal eyes.
Methink I hear the latter trumpet sound,
When emptie graves into this place is found,
Of young and old, which is most strange to me,
What kind of resurrection this may be.
I thought God had reserved this power alone
Unto himself, till he erect'd his throne
Into the clouds, with his attendance by,
That he might judge the world in equity.
But now I see the contrar in our land,
Since men do raise the dead at their own hand;
And for to please their curiosities
They them dissect and make anatomies.
Such monsters of mankind was never known,
As in this place is daily to be shown;
Who, for to gain some wordly vanities,
Are guilty of such immoralities.
The Turks and Pagans would amazed stand,
To see such crimes committed in a land,
As among Christians is to be found,
Especially in Edinburgh doth abound.
There is a rank of persons in this place
That strive to run with speed a wicked race:
They trample rudely on God's holy law,
And of his judgment they stand not in aw;
For those that are laid in their graves at rest,
This wicked crew they do their dust molest.
Dead corps out of their graves they steal at night,
Because such actions do abhore the light.
The heathen nations, for ought I read,
Was never found for to molest the dead,
That were their kindred, and among them born;
But we to nations all may be a scorn:
In that such crimes is perpetrated here,
As both the living and the dead do deer.
These monsters of mankind, who made the graves,
To the chirurgeons became hyred slaves;

They rais'd the dead again out of the dust,
And sold to them to satisfy their lust.
As I'm informed, the chirurgeons did give
Fourty shillings for each one they receive:
And they their flesh and bones asunder part,
Which wounds their living friends unto the heart;
To think that any of their kindred born
Unto the nations, should become a scorn;
For they their bones to other nations send—
As I'm informed, this is their very end.
How may now all the nations us deride,
And call us poor, since that we sell our dead,
Some coyn to get, the living to maintain;
The like in any nation ne're was seen.
The godly sowe their dust on such cold ground
As do our kirks and chappels compass round,
That they get their dust in such a field,
So well refin'd, that it to them may yield
A crop most plentiful at the last day,
When they from dust must haste and come away.
But now their dust they take out of the ground,
So that nothing but empty graves is found.
I'm very sorry that such things should be
Practis'd by folk professing piety;
And the religions should be wounded so
By any who under a name do go.
But still I see profession is no grace,
As does appear into the present case;
But more especially at the last day,
When all the world shall be put in a fray,
When stars shall fall out of the firmament,
And sun and moon out of their orbs be rent,
And all this earth into a flame shall burn,
And eliments like liquid mettals run,
And all mankind before God's throne shall come,
That he may justice do unto each one—
Then shall the separation be made
Between them that are good and that are bad:
The good received to everlasting glore,
The bad cast down to hell for evermore.
All who to wrong the saints do still desire,
Dead or alive, shall have hell for their hyre,
Unless with speed they do repent of sin,
And do another course of life begin.
But I shall say no more upon this head,
Hoping thenceforth they will not raise the dead,
But suffer them to rest into their beds,
And won their bread by following other trades.

FINIS."

THE following particulars have been gathered from a conversation with an old man, James Maclean, a hawker, and a native of Ireland, residing in Hammermen's Land, West Port, who appears to have been most intimately acquainted with all the parties, and yet no participator in their crimes. The narrator having left Edinburgh very privately and repaired to Glasgow on the 12th of October, for the purpose of hawking an account of a woman, M'Menemy, who was to be executed there for murder on the 14th, and not returning home till Burke and the rest were apprehended,—it was rumoured, amongst his neighbours in the West Port, that he also had fallen a victim to their diabolical arts.

WILLIAM BURKE is a native of Ireland, the son of Niel Burke, a labourer, residing in the parish of Urney, within two miles of the town of Strabane, in the county of Tyrone, and is about thirty-six years old. He served in the Donnegal militia, either as a fifer or drummer, and plays well on the flute. He was discharged from the regiment after the battle of Waterloo, and came to this country in 1817 or 1818, where he was employed as a labourer at the formation of the Union Canal. His original trade was that of a shoemaker and cobbler; and for about two years previous to Whitsunday last, he lodged in Hare's house in Tanner's Close, following his occupation in a cellar attached to the house, in which was kept a donkey belonging to Hare. Like the generality of his countrymen, he seems to have turned his hand to any thing—sometimes trafficking in pedlary ware, old clothes, &c.—last harvest he was a reaper at Mr. Edington's, a farmer near Carnwath, along with his wife and Hare; Maclean having engaged them and several others of his countrymen for that purpose. He describes Burke, when unintoxicated, as a peaceable man, and steady at his work; and even when drunk, rather jocose and prone to banter, but by no means riotous or quarrelsome, without considerable provocation.

HELEN M'DOUGAL is a native of Redding, near Falkirk, where she married, and had two children, a boy and a girl; while residing there,* she became acquainted with Burke during the time he was

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* It is reported that she had two husbands, and that the last is still alive.

a labourer at the canal. She has cohabited with him for about ten years, and is of a dull morose disposition, either when sober or intoxicated. Burke and she led a most unhappy life, everlastingly quarrelling, and on these occasions she was often severely beaten by him.

William Hare, who turned king's evidence against Burke, is a native of Newry, in Ireland, and has been for some time employed as a boatman, and labourer at the Union Canal; he is much about the same age as Burke. Shortly after he came to Edinburgh, about ten years ago, he resided with a labourer named James Logue, who, with his wife Mary Laird, lived at the back of the well in the West Port; from thence they removed to the house in Tanner's Close, lately occupied by Hare (the scene of the murder of Daft Jamie), where Logue died. By this man Laird had one child, and after his death, Hare, making advances to the widow, they were regularly married, about two years ago. He is of a ferocious and tyrannical disposition, much inclined to quarrel, and very obstreperous when in liquor. As an instance of this—in the end of last summer, when M'Lean (the narrator), Hare, Burke, his wife, and others, were returning from the *shearing* at Carnwath, as formerly mentioned, the whole party went into a public house on the west side of Balerno, near Currie, to get some refreshment. The reckoning being clubbed, Hare snatched up the money from the table, and put it into his pocket; when Burke, fearing lest a disturbance should take place in the house, paid the whole amount. After they left the inn, M'Lean observed to Hare it was a *scaly* trick to lift the money with an intention to affront them. On this Hare *knocked the feet from under* M'Lean, and when prostrate on the ground, gave him a tremendous kick on the face. His shoes being pointed with iron plates, commonly called *caulkers*, he wounded M'Lean severely, laying open his upper lip.

Mary Laird, the wife of Hare, is also said to be a native of Ireland, and is represented as a desperate character, and of a most boisterous disposition, tyrannizing over those under her control—completely given to drinking—often brutally intoxicated, and seldom without a pair of black eyes. Her treatment of her yoke-fellow has always been imperious in the extreme. On one occasion, he came home from his work at the canal, and found her much inebriated;

after remonstrating with her on the subject, and laying himself down on the bed, she seized a bucket of water, and dashed the contents over him. Hare started up, knocked her down, and a desperate struggle ensued, in which, as is usual with her, she had the last word and the last blow. It is stated that Burke, Hare, and his wife, are all of the Roman Catholic persuasion.

In addition to the preceding particulars, the publishers beg leave to subjoin the following very judicious remarks, copied from the CALEDONIAN MERCURY of Thursday the 25th December.

"No trial in the memory of any man now living has excited so deep, universal, and (we may almost add) appalling an interest as that of William Burke and his female associate. By the statements which have from time to time appeared in the newspapers, public feeling has been worked up to the highest pitch of excitement, and the case, in so far as the miserable pannels were concerned, prejudiced by the natural abhorrence which the account of a new and unparalleled crime is calculated to excite. This is an evil inseparable from the freedom, activity, and enterprise of the press, which is necessarily compelled to lay hold of the events of the passing hour, more especially when these are of an extraordinary or unprecedented kind; but it is more than atoned for by many countervailing advantages of the greatest moment to the interests of the community; and we are moreover satisfied that any prejudice or prepossession thus created, was anxiously and effectually excluded from the minds of those by whom this singular case was tried, and that they were swayed by no consideration except a stern regard to the sanction of their oaths, the purity of justice, and the import of the evidence laid before them. At the same time, it is not so much to the accounts published in the newspapers, which merely embodied and gave greater currency to the statements circulating in society, as to the extraordinary, nay, unparalleled circumstances of the case, that the strong excitement of the public mind is to be ascribed. These are without any precedent in the records of our criminal practice, and, in fact, amount to the realization of a nursery tale. The recent deplorable increase of crime has made us familiar with several new atrocities: poisoning is now, it seems, rendered subsidiary to the commission of theft: stabbings, and attempts at assassination, are matters of almost every-day occurrence; and murder has grown so familiar to us, that it has almost ceased to be viewed with that instinctive and inexpressible dread which the commission of the greatest crime against the laws of God and society used to excite. But the present is the first instance of murder alleged to have been perpetrated with the aforethought purpose and intent of selling the murdered body as a subject for dissection to Anatomists; it is a new species of assassination, or murder for hire: and as such, no less than from the general horror felt by the people of this country at the process, from ministering to which the reward was expected, it was certainly calculated to make a deep impression on the public mind, and to awaken feelings of strong and appalling interest in the issue of the trial.

"Of the extent to which this had taken place, it was easy to judge from what was every where observable on Monday and Tuesday. The approaching trial formed the universal topic of conversation, and all sorts of speculations and conjectures were afloat as to the circumstances likely to be disclosed in the course of it, and the various results to which it would eventually lead. As the day drew near, the interest deepened; and it was easy to see that the common people shared strongly in the general excitement. The coming trial they expected to disclose something which they had often dreamed of, or imagined, or heard recounted around an evening's fire, like a raw-head-and-bloody-bones story, but which they never, in their sober judgment, either feared or believed to be possible; and they looked forward to it with corresponding but indescribable emotions. In short, all classes participated more or less in a common feeling respecting the case of this unhappy man and his associate; all expected fearful disclosures; none, we are convinced, wished for any thing but justice.

"About twenty minutes before ten o'clock, the prisoners, William Burke and Helen M'Dougal, were placed at the bar. The male prisoner, as his name indicates, is a native of Ireland. He is a man rather below the middle size, but stoutly made, and of a determined, though not peculiarly sinister expression of countenance. The contour of his face, as well as the features, are decidedly Milesian. It is round, with high cheek bones, grey eyes, a good deal sunk in the head, a short snubbish nose, and a round chin, but altogether of a small cast. His hair and whiskers, which are of a light sandy colour, comported well with the make of the head and the complexion, which is nearly of the same hue. He was dressed in a shabby blue surtout, buttoned close to the throat, and had, upon the whole, what is called in this country a *wauf* rather than a ferocious appearance, though there is a hardness about the features, mixed with an expression in the grey twinkling eyes, far from inviting. The female prisoner is fully of the middle size, but thin and spare made, though evidently of large bone. Her features are long, and the upper half of her face is out of proportion to the lower. She was miserably dressed in a small grey-coloured velvet bonnet, very much the worse for the wear, a printed cotton shawl and cotton gown. She stoops considerably in her gait, and has nothing peculiar in her appearance, except the ordinary look of extreme poverty and misery common to unfortunate females of the same degraded class. Both prisoners, especially Burke, entered the Court without any visible signs of trepidation, and both seemed to attend very closely to the proceedings which soon after commenced.

The Publishers further add as follows from the same ably conducted Journal of 27th December.

"We shall endeavour to exhibit a faint sketch of the more prominent circumstances attending the murder of the woman Campbell or Docherty, as proved in evidence at the trial.

"In the morning of a certain day in October last (the 31st), Burke chances to enter the shop of a grocer, that of Rymer, where he sees a poor beggar woman asking charity. He accosts her, and the brogue instantly reveals their common country. The poor old woman's heart warms to her countryman, and she tells him that

her name is Docherty, and that she has come from Ireland in search of her son. Burke, on the other hand, improves his advantage by pretending that his mother's name was also Docherty, and that he has a wonderous affection for all who bear the same euphonous and revered name. The old woman is perfectly charmed with her good fortune in meeting such a friend in such a countryman, and her heart perfectly overflows with delight. Burke, again, seeing that he had so far gained his object, follows up his professions of regard by inviting Mrs. Docherty to go with him to his house, at the same time offering her an asylum there. The poor beggar woman accepts the fatal invitation, and accompanies Burke to that dreadful den, the scene of many previous murders, whence she is destined never to return. Here the ineffable ruffian treats her to her breakfast; and as her gratitude rises, his apparent attention and kindness increase. This done, however, he goes in search of his associate and accomplice Hare, whom he informs that he has "got a *shot* in the house," and invites to come over at a time and hour agreed upon "to see it done." Betwixt eleven and twelve o'clock at night is fixed upon by these execrable miscreants, for destroying the unhappy victim whom Burke had previously seduced into the den of murders and death; and then Burke proceeds to make the necessary arrangements for the commission of the crime. Gray and his wife, lodgers in Burke's house, and whom the murderers did not think it proper or safe to entrust with the secret, are removed for that night alone; another bed is procured for them, and paid for, or offered to be paid for, by Burke. By and by the murderers congregate, and females cognisant of their past deeds, as well as of the crime which was to be perpetrated, mingle with them in this horrid meeting. Spirituous liquor is procured, and administered to the intended victim. They all drink more or less deeply. Sounds of mirth and revelry are heard echoing from this miniature pandemonium; and a dance in which they all, including the beggar woman, join, complete these infernal orgies. This is kept up for a considerable while, and is the immediate precursor of a deed which blurs the eye of day, and throws a deeper and darker shade around the dusky brow of night.

"At length the time for "doing it" arrives. Burke and Hare get up a sham fight, to produce a noise as of brawling and quarrelling, common enough in their horrid abode; and when this has been continued long enough as they think, Burke suddenly springs like a hungry tiger on his victim, whom one of his accomplices had, as if by accident, thrown down—flings the whole weight of his body upon her breast—grapples her by the throat—and strangles her outright. Ten minutes or a quarter of an hour elapse while this operation is going on, and ere it is completed; during the whole of which time, Hare, by his own confession in the witness-box, sat upon the front of the bed, a cool spectator of the murder, without raising a cry, or stretching out a hand to help the unhappy wretch thus hurried into eternity by his associate fiend Burke. As to the women (Helen M'Dougal, Burke's helpmate, and the wife of the miscreant Hare), they seem to have retreated into a passage closed in by an outer door, "when they saw him (Burke) on the top of her" (Docherty), and to have remained there while he was perpetrating the murder, without, however, uttering a single sound, or doing a single act, calculated to interrupt the murderer in his work of blood, or to procure assistance to the dying victim. These she-devils were familiar with the work of death; and one of them, the wife of Hare, confessed it in the witness-box. She had seen, she said, such "tricks" before.

"No language can add to the impression which these facts are calculated to produce. The succeeding events, however, are not less picturesquely horrifying. The murder was committed at eleven o'clock, and in an hour after, or at twelve, Burke

fetches Paterson, the assistant or servant of a teacher of anatomy here, to whom he was in the habit of selling the bodies of his victims, to the spot — the murdered body being by this time stuffed under the bed and covered with straw; and, pointing to that truly dreadful place, tells him that he has got a subject for him there, which will be ready for him in the morning. The demons then appear to have recreated themselves with fresh dozes of liquor; and about four or five in the morning, the two women already mentioned, with a fellow of the name of Brogan, who had joined the party after the deed was done, laid down in the bed, beneath which the murdered body of Docherty, not yet cold in death, had been crammed, and went to sleep, some of them at least, as coolly as if nothing of the kind had occurred. When daylight returned, the tea-box, so often mentioned in the course of the trial, was procured, and the slaughtered body crammed into it, and sent off by the porter M'Culloch, to Surgeon Square. After which Burke and his accomplice Hare set off for Newington to obtain the whole or part of the price of the subject they had procured by murder, and actually got *five pounds*, being one half of the price agreed upon.

"Such is an imperfect and feeble outline of the facts of this case, in the course of which was disclosed the horrid and appalling fact, that, in certain holes and dens, both in the heart and in the outskirts of this city, murder had been reduced into a system, with the view of obtaining money for the bodies murdered; and that it was perpetrated in the manner least likely to leave impressed upon it any evident or decisive marks of violence, being invariably committed by means of suffocation or strangling, during partial or total intoxication. The public is therefore to consider the present as only one out of many instances of a similar nature which have occurred. Hare's wife admitted that she had witnessed many "tricks" of the same kind; and Hare himself, when undergoing the searching cross-examination of Mr. Cockburn—a cross-examination such as was never before exemplified in any Court of Justice—durst not deny that he had been concerned in other murders besides that of Docherty,—that a murder had been committed in his own house in the month of October last,—that he himself was a murderer, and his hands steeped in blood and slaughter; we say he durst not deny it, and only took refuge in "declining to answer" the questions put to him; which the Court of course apprised him he was entitled to do in regard to questions that went to criminate himself so deeply, and but for which caution we have little doubt that he would have confessed not merely accession, but a principal share in several murders. In fact, this "squalid wretch," as Mr. Cockburn so picturesquely called him, from the hue and look of the carrion-crow in the witness-box, was disposed to be extremely communicative, and apparently had no idea that any thing he had stated was at all remarkable or extraordinary.

"The conviction of Burke alone will not satisfy either the law or the country. The unanimous voice of society in regard to Hare is, *Delendus est;* that is to say, if there be evidence to convict him, as we should hope there is. He has been an accessory before or after the fact in nearly all of these murders; in the case of poor Jamie he was unquestionably a principal; and his evidence on Wednesday only protects him from being called to account for the murder of Docherty. WE TRUST, THEREFORE, THAT THE LORD ADVOCATE, WHO HAS SO ABLY AND ZEALOUSLY PERFORMED HIS DUTY TO THE COUNTRY UPON THIS OCCASION, WILL BRING THE "SQUALID WRETCH" TO TRIAL, AND TAKE EVERY OTHER MEANS IN HIS POWER TO HAVE THESE ATROCITIES PROBED AND SIFTED TO THE BOTTOM."

TRIAL

OF

WILLIAM BURKE

AND

HELEN M'DOUGAL.

24TH DECEMBER
1828.

TRIAL

OF

WM. BURKE AND HELEN M'DOUGAL.

PRELIMINARY PROCEEDINGS.

ON the —— day of November 1828, a citation was served upon the pannels, charging them to appear before the High Court of Justiciary, to be held at Edinburgh on Wednesday 24th of December, at ten o'clock, forenoon, to underlie the law for the crime of Murder, on the following indictments:

WILLIAM BURKE and HELEN M'DOUGAL, both present prisoners in the tolbooth of Edinburgh, you are both and each of you indicted and accused at the instance of Sir William Rae of St Catherine's, Baronet, his Majesty's Advocate for his Majesty's interest: That *albeit* by the laws of this and every other well-governed realm, MURDER is a crime of an heinous nature, and severely punishable, *yet true it is and of verity* that you the said William Burke and Helen M'Dougal are both and each, or one or other of you, guilty of the said crime, actors or actor, or art and part: *In so far as,* on one or other of the days between the 7th and the 16th days of April 1828, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, within the house in Gibb's Close, Canongate, Edinburgh, then and now or lately in the occupation of Constantine Burke, then and now or lately scavenger in the employment of the Edinburgh Police Establishment, you the said William Burke did wickedly and feloniously place or lay your body or person, or part thereof, over or upon the breast, or person, and face of Mary Paterson or Mitchell, then or recently before that time, or formerly, residing with Isabella Burnet or Worthington, then and now or lately residing in Leith Street, in or near Edinburgh, when she the said Mary Paterson or Mitchell was lying in the said house in a state of

intoxication, and did, by the pressure thereof, and by covering her mouth and nose with your body or person, and forcibly compressing her throat with your hands, and forcibly keeping her down, notwithstanding her resistance, or in some other way to the prosecutor unknown, preventing her from breathing, suffocate or strangle her; and the said Mary Paterson or Mitchell was thus by the said means, or part thereof, or by some other means or violence, the particulars of which are to the prosecutor unknown, wickedly bereaved of life, and murdered by you the said William Burke; and this you did with the wicked aforethought intent of disposing of, or selling the body of the said Mary Paterson or Mitchell, when so murdered, to a physician or surgeon, or some person in the employment of a physician or surgeon, as a subject for dissection, or with some other wicked and felonious intent or purpose to the prosecutor unknown. (2.) FURTHER, on one or other of the days between the 5th and 26th days of October 1828, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, within the house situated in Tanner's Close, Portsburgh, or Wester Portsburgh, in or near Edinburgh, then or now or lately in the occupation of William Haire or Hare, then and now or lately labourer, you the said William Burke did wickedly and feloniously attack and assault James Wilson, commonly called or known by the name of Daft Jamie, then or lately residing in the house of James Downie, then and now or lately porter, and then and now or lately residing in Stevenlaw's Close, High Street, Edinburgh, and did leap or throw yourself upon him, when the said James Wilson was lying in the said house, and he having sprung up you did struggle with him, and did bring him to the ground, and you did place or lay your body or person, or part thereof, over or upon the person or body and face of the said James Wilson, and did, by the pressure thereof, and by covering his mouth and nose with your person or body, and forcibly keeping him down, and compressing his mouth, nose, and throat, notwithstanding every resistance on his part, and thereby, or in some other manner to the prosecutor unknown, preventing him from breathing, suffocate or strangle him; and the said James Wilson was thus, by the said means, or part thereof, or by some other means or violence, the particulars of which are to the prosecutor unknown, wickedly bereaved of life and murdered by you the said William Burke: and this you did with the wicked aforethought intent of disposing of, or selling the body of the said James Wilson, when so murdered, to a physician or surgeon, or to some person in the employment of a physician or surgeon, as a subject for dissection, or with some other wicked and felonious intent or purpose to the prosecutor unknown. (3.) FURTHER, on Friday the 31st day of October 1828, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, within the house then or lately occupied by you the said William Burke, situated in that street of Portsburgh or Wester Portsburgh, in or near Edinburgh, which runs from the Grassmarket of Edinburgh to Main Point, in or near Edinburgh, and on the north side of the said street, and having an access thereto by a trance or passage entering from the street last above libelled, and having also an entrance from a court or

back court on the north thereof, the name of which is to the prosecutor unknown, you the said William Burke and Helen M'Dougal did, both and each, or one or other of you, wickedly and feloniously place or lay your bodies or persons, or part thereof, or the body or person, or part thereof, of one or other of you, over or upon the person or body and face of Madgy or Margery, or Mary M'Gonegal or Duffie, or Campbell, or Docherty, then or lately residing in the house of Roderick Stewart or Steuart, then and now or lately labourer, and then and now or lately residing in the Pleasance, in or near Edinburgh, when she the said Madgy or Margery, or Mary M'Gonegal or Duffie, or Campbell, or Docherty, was lying on the ground, and did, by the pressure thereof, and by covering her mouth and the rest of her face with your bodies or persons, or the body or person of one or other of you, and by grasping her by the throat, and keeping her mouth and nostrils shut with your hands, and thereby, or in some other way to the prosecutor unknown, preventing her from breathing, suffocate or strangle her; and the said Madgy or Margery, or Mary M'Gonegal or Duffie, or Campbell, or Docherty, was thus by the said means, or part thereof, or by some other means or violence, the particulars of which are to the prosecutor unknown, wickedly bereaved of life, and murdered by you the said William Burke, and you the said Helen M'Dougal, or one or other of you, and this you both and each, or one or other of you, did with the wicked aforethought intent of disposing of or selling the body of the said Madgy or Margery, or Mary M'Gonegal or Duffie, or Campbell, or Docherty, when so murdered, to a physician or surgeon, or to some person in the employment of a physician or surgeon, as a subject for dissection, or with some other wicked and felonious intent or purpose to the prosecutor unknown. And you, the said William Burke, having been taken before George Tait, Esq. sheriff-substitute of the shire of Edinburgh, you did, in his presence, at Edinburgh, emit and subscribe five several declarations, of the dates respectively following, viz. the 3d, 10th, 19th, and 29th days of November, and 4th day of December 1828; and you the said Helen M'Dougal having been taken before the said sheriff-substitute, you did, in his presence, at Edinburgh, emit two several declarations, one upon the 3d, and another upon the 10th days of November 1828; which declarations were each of them respectively subscribed in your presence by the said sheriff-substitute, you having declared that you could not write; which declarations being to be used in evidence against each of you by whom the same were respectively emitted; as also the skirt of a gown, as also a petticoat, as also a brass snuff-box, and a snuff-spoon; a black coat, a black waistcoat, a pair of moleskin trowsers, and a cotton handkerchief or neckcloth, to all of which sealed labels are now attached, being to be used in evidence against you the said William Burke; as also a coarse linen sheet, a coarse pillow-case, a dark printed cotton gown, a red striped cotton bed-gown, to which a sealed label is now attached; as also a wooden box; as also a plan entitled 'Plan of Houses in Wester Portsburgh and places adjacent,' and bearing to be dated 'Edinburgh, 20th November 1828,' and to be signed by James Braidwood, 22, Society; being all to be used in evidence against both and each of you the said William Burke and Helen M'Dougal, at

your trial, will, for that purpose, be in due time lodged in the hands of the clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same; *all which*, or part thereof, being found proven by the verdict of an assize, or admitted by the respective judicial confessions of you the said William Burke and Helen M'Dougal, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary,—you the said William Burke and Helen M'Dougal *ought* to be punished with the pains of law, to deter others from committing the like crimes in all time coming. (Signed) A. WOOD, *A. D.*

LIST OF WITNESSES.

1 George Tait, Esq. sheriff-substitute of the shire of Edinburgh.
2 Archibald Scott, procurator-fiscal of said shire.
3 Richard John Moxey, now or lately clerk in the sheriff-clerk's office, Edinburgh.
4 Archibald M'Lucas, now or lately clerk in the sheriff-clerk's office, Edinburgh.
5 Janet Brown, now or lately servant to, and residing with, Isabella Burnet, or Worthington, now or lately residing in Leith Street, in or near Edinburgh.
6 The foresaid Isabella Burnet or Worthington.
7 Elizabeth Graham or Burke, wife of Constantine Burke, now or lately scavenger in the employment of the Edinburgh Police, and now or lately residing in Gibb's Close, Canongate, Edinburgh.
8 The foresaid Constantine Burke.
9 Jean Anderson or Sutherland, wife of George Sutherland, now or lately silversmith, and now or lately residing in Middleton's Entry, Potterrow, Edinburgh.
10 William Haire or Hare, present prisoner in the tolbooth of Edinburgh.
11 Margaret Laird or Haire or Hare, wife of the foresaid William Haire or Hare, and present prisoner in the tolbooth of Edinburgh.
12 Jean Macdonald or Coghill, wife of Daniel Coghill, now or lately shoemaker, and now or lately residing in South St James' Street, in or near Edinburgh.
13 Margaret M'Gregor, now or lately servant to, and residing with, John Clark, now or lately baker, and now or lately residing in Rose Street, in or near Edinburgh.
14 Richard Burke, son of, and now or lately residing with, the foresaid Constantine Burke.
15 William Burke, son of, and now or lately residing with, the foresaid Constantine Burke.
16 Janet Wilson or Downie, wife of James Downie, now or lately porter, and now or lately residing in Stevenlaw's Close, High Street, Edinburgh.

17 Mary Downie, daughter of, and now or lately residing with, the foresaid James Downie.
18 William Cunningham, now or lately scavenger in the employment of the Edinburgh Police, and now or lately residing in Fairley's Entry, Cowgate, Edinburgh.
19 George Barclay, now or lately tobacconist in North College Street, in or near Edinburgh.
20 David Dalziell, now or lately copperplate printer, and now or lately residing with his father, George Dalziell, now or lately painter, and now or lately residing in North Foulis' Close, High Street, Edinburgh.
21 Margaret Newbigging or Dalziell, wife of the foresaid David Dalziell.
22 Joseph M'Lean, now or lately tinsmith, and now or lately residing in Coul's Close, Canongate, Edinburgh.
23 Andrew Farquharson, now or lately sheriff-officer in Edinburgh.
24 George M'Farlane, now or lately porter, and now or lately residing in Paterson's Court, Lawnmarket, Edinburgh.
25 John Brogan, now or lately in the employment of John Vallance, now or lately carter, and now or lately residing in Semple Street, near Edinburgh.
26 Janet Lawrie, or Law, wife of Robert Law, now or lately currier, and now or lately residing in Portsburgh or Wester Portsburgh, in or near Edinburgh.
27 Ann Black or Connaway, or Conway, wife of John Connaway, or Conway, now or lately labourer, and now or lately residing in Portsburgh or Wester Portsburgh aforesaid.
28 The foresaid John Connaway, or Conway.
29 William Noble, now or lately apprentice to David Rymer, now or lately grocer and spirit-dealer in Portsburgh or Wester Portsburgh aforesaid.
30 James Gray, now or lately labourer, and now or lately residing with Henry M'Donald, now or lately dealer in coals, and now or lately residing in the Grassmarket, Edinburgh.
31 Ann M'Dougall or Gray, wife of the foresaid James Gray.
32 Hugh Alston, now or lately grocer, and now or lately residing in Portsburgh or Wester Portsburgh aforesaid.
33 Elizabeth Paterson, daughter of, and now or lately residing with, Isabella Smith or Paterson, now or lately residing in Portsburgh or Wester Portsburgh aforesaid.
34 The foresaid Isabella Smith or Paterson.
35 John M'Culloch, now or lately porter, and now or lately residing in Allison's Close, Cowgate, Edinburgh.
36 John Fisher, now or lately one of the criminal officers of the Edinburgh police establishment.
37 John Findlay, now or lately one of the patrol of the Edinburgh police establishment.
38 James Paterson, now or lately lieutenant of the Edinburgh police establishment.
39 James M'Nicol, now or lately one of the sergeants of the Edinburgh police establishment.

40 Mary Stewart or Stuart, wife of Roderick Stewart or Stuart, now or lately labourer, and now or lately residing in the Pleasance, near Edinburgh.
41 The foresaid Roderick Stewart or Stuart.
42 Charles M'Lauchlan, now or lately shoemaker, and now or lately residing with the foresaid Roderick Stewart or Stuart.
43 Elizabeth Main, now or lately servant to the foresaid William Haire or Hare.
44 Robert Knox, M.D. lecturer on Anatomy, now or lately residing in Newington Place, near Edinburgh.
45 David Paterson, now or lately keeper of the Museum belonging to the foresaid Dr Robert Knox, and now or lately residing in Portsburgh or Wester Portsburgh aforesaid, with his mother the foresaid Isabella Smith or Paterson.
46 Thomas Wharton Jones, now or lately surgeon, and now or lately residing in West Circus Place, in or near Edinburgh, with his mother Margaret Cockburn, or Jones.
47 William Ferguson, now or lately surgeon, and now or lately residing in Charles Street, in or near Edinburgh, with his brother John Ferguson, now or lately writer.
48 Alexander Miller, now or lately surgeon, and now or lately residing in the lodgings of Elizabeth Anderson or Montgomery, now or lately residing in Clerk Street, in or near Edinburgh.
49 Robert Christison, M.D. now or lately professor of Medical Jurisprudence in the University of Edinburgh.
50 William Pulteney Alison, M.D. now or lately Professor of the Theory of Physic in the University of Edinburgh.
51 William Newbigging, now or lately surgeon, and now or lately residing in St Andrew Square, Edinburgh.
52 Alexander Black, now or lately surgeon to the Edinburgh police establishment.
53 James Braidwood, now or lately builder, and master of fire engines on the Edinburgh police establishment.
54 Alexander Maclean, now or lately sheriff-officer in Edinburgh.
55 James Evans, student of medicine, now or lately residing with Mr James Moir, surgeon, residing in Teviot Row, in or near Edinburgh.

A. WOOD, *A.D.*

LIST OF ASSIZE.—*24th December* 1828.

City of Edinburgh.

Special Jurors.

James Trench, builder, London Street
John Paton, builder, Great King Street
Nicol Allan, manager of the Hercules Insurance Company, Heriot Bridge
Charles Ferrier, accountant, Northumberland Street
5 John Ramsay, merchant, residing in Prince's Street

William Bonar, banker, Abercromby Place
Peter M'Gregor, merchant, Castle Street
Thomas Storrar, baker, Mansfield Place.

Common Jurors.

Robert Jeffrey, engraver, Milne's Square
10 John Letham, baker, Pitt Street
Alexander Thomson, grocer, West Bow
David Hunter, ironmonger, Jamaica Street
James Meliss, merchant, Blair Street
Robert Walker, tailor, Broughton Street
15 William Robertson, cooper, Bank Street
George Hogarth, jeweller, Milne's Square
Richard Jones, tailor, Waterloo Place
Thomas Nelson, bookseller, West Bow
George Drummond, builder, Scotland Street
20 John Davidson, tailor, Greenside Street
Robert Steele, confectioner, Hanover Street
William Simpson, poulterer, Hunter Square
William M'Kay, cabinet-maker, South Charlotte Street
George Andrew Lutenor, portrait painter, Dundas Street.

TOWN OF LEITH.

Special Jurors.

25 Charles White, merchant, Charlotte Street
Abram Newton, merchant, James Place.

Common Jurors.

John M'Fee, merchant, James Place
David Brash, grocer, Coalhill
Thomas Barker, brewer, Yardheads
30 Thomas Heriot Weir, baker, Kirkgate.

COUNTY OF EDINBURGH.

Special Jurors.

Sir John Hamilton Dalrymple of Cousland and Falla, Baronet, Oxenford Castle
William Hunter, farmer, Poltonhall.

Common Jurors.

James Banks, agent, Cassels Place, Leith Walk
Charles Marshall, meal-dealer, Marshall's Place, Stockbridge
35 George Ritchie, merchant, Cassels Place, Leith Walk
James Allan, wine-merchant, Hope Street, Leith Walk.

COUNTY OF LINLITHGOW.

Special Juror.

Andrew Vannan, distiller, Borrowstounness.

Common Jurors.

Robert Arkley, baker, Borrowstounness
James Ainslie, grocer there
40 Thomas Boag, shipbuilder there

COUNTY OF HADDINGTON.

Special Jurors.

John Hutton, residing at Gifford Vale
Robert Ainslie of Redcoal.

Common Jurors.

William Bell, grocer, Dunbar
Henry Fenwick, grocer, there
Alexander Sanderson, grocer, there.

TRIAL.

WEDNESDAY, 24th December, 1828.

The Court met precisely a Quarter past Ten o'Clock.

PRESENT,

The Right Hon. DAVID BOYLE, LORD JUSTICE CLERK.	LORD MEADOWBANK.
LORD PITMILLY.	LORD MACKENZIE.

Counsel for the Crown.

Sir WILLIAM RAE, Bart.—*Lord Advocate.*

ARCHIBALD ALISON, Esq.
ROBERT DUNDAS, Esq.
ALEXANDER WOOD, Esq.
} *Advocates-Depute.*

JAMES TYTLER, Esq. W. S. *Agent.*

Counsel for the Pannels.

For Burke.	*For M'Dougal.*
The DEAN of FACULTY.	HENRY COCKBURN.
PATRICK ROBERTSON.	MARK NAPIER.
DUNCAN M'NIELL.	HUGH BRUCE.
DAVID MILNE.	GEORGE PATTON.

JAMES BEVERIDGE, W. S. one of the Agents for the Poor,—*Agent.*

The Pannels took their place at the Bar.

The instance being called by the Macer, the Lord Justice Clerk said—William Burke, and Helen M'Dougal, pay attention to the indictment that is now to be read against you.

Mr ROBERTSON.—It is unnecessary to read this libel at present. We have an objection to this style of proceeding—an objection against that libel being proceeded in in this shape; and it is proper to state the objection to it at present.

LORD JUSTICE CLERK.—I am quite unaccustomed to this mode of primary objection to an indictment being read. The

objection to the relevancy of the indictment is the proper time to state it, and not at this time.

Mr Robertson.—It is not necessary that it should be previously read, by the recent statute.

Lord Justice Clerk.—We have found very little advantage from not reading indictments. The proper way is to read them, unless they are uncommonly laid.

Mr Cockburn.—It is not necessary to be read. We object to the reading it, as it prejudices the prisoners. We think that the prisoners would be prejudiced by reading that which the Court will ultimately find no legal part of the libel.

Lord Meadowbank.—What I hesitate about at all, is against interfering with the discretion of the Court.

Mr Robertson.—If the Court wish the indictment read, we do not mean to press the matter farther.

Lord Justice Clerk.—I think that every thing should be read.

William Burke, and Helen M'Dougal, stand up and hear the indictment now to be read.

The preceding indictment, (on pages 1 to 4), was then read by the Clerk of Court.

The following Defences against the indictment were lodged for the prisoner Burke:—

'The pannel submits that he is not bound to plead to, or to 'be tried upon, a libel, which not only charges him with three 'unconnected murders, committed each at a different time, and 'at a different place, but also combines his trial with that of an-'other pannel, who is not even alleged to have had any concern 'with two of the offences of which he is accused. Such an ac-'cumulation of offences and pannels is contrary to the general 'and the better practice of the Court; it is inconsistent with the 'right principle; and, indeed, so far as the pannel can discover, 'is altogether unprecedented; it is totally unnecessary for the 'ends of public justice, and greatly distracts and prejudices the 'accused in their defence. It is therefore submitted, that the 'libel is completely vitiated by this accumulation, and cannot 'be maintained as containing a proper criminal charge. On 'the merits of the case, the pannel has only to state, that he is 'not guilty, and that he rests his defence on a denial of the 'facts set forth in the libel.'

The Defences for Helen M'Dougal were lodged and read as follows:—

'If it shall be decided that the prisoner is obliged to answer 'to this indictment at all, her answer to it is, that she is not 'guilty, and that the Prosecutor cannot prove the facts on 'which his charge rests. But she humbly submits that she is 'not bound to plead to it. She is accused of one murder com-'mitted in October 1828, in a house in Portsburgh, and of no 'other offence. Yet she is placed in an indictment along with 'a different person, who is accused of other two murders, each 'of them committed at a different time, and at a different place, '—it not being alleged that she had any connexion with either 'of these crimes. This accumulation of pannels and of of-'fences is not necessary for public justice, and exposes the ac-'cused to intolerable prejudice, and is not warranted, so far as 'can be ascertained, even by a single precedent.'

Mr Robertson.—My Lords, in support of the defences which have now been read to your Lordships, I must direct the attention of the Court, as shortly as I can, to the grounds upon which we conceive that the trial upon this indictment should not be allowed to proceed. In the indictment there are named two prisoners, William Burke and Helen M'Dougal, which two prisoners are not stated on the face of the indictment to have had any connexion with one another. It is simply stated, that there are two separate and distinct prisoners to be tried for murder, under one indictment. My Lords, the major proposition of the indictment contains a charge of murder, laid simply without any specific aggravation whatever,—then the minor proposition contains three charges for murder, totally unconnected with one another. The first charge is against William Burke alone, of a murder said to have been committed in the month of April, or the month of March preceding, or May immediately following, in a certain place of the Canongate of Edinburgh. It is not stated that Burke had any accomplices in this murder. He is the sole person charged with that specific offence. Then, my Lords, after describing the manner in which the murder is alleged to have been committed, it is stated, in the end of the charge, that this was done by the prisoner, 'with the wicked 'aforethought intent of disposing of, or selling the body of the 'said Mary Paterson, or Mitchell, when so murdered, to a phy-'sician, or surgeon, or some person in the employment of a 'physician, or surgeon, as a subject for dissection, or with some 'other wicked and felonious intent, to the prosecutor

Thus, while, on the one hand, as your Lordships will recollect, there is no specific aggravation stated in the major proposition, —so, on the other, when the prosecutor comes to describe the intent with which the murder was committed, he does not confine himself to one species of intent, but states, that the murder was committed either for the purpose of giving the body over to a physician, or with some other felonious intention. Then, my Lords, the second charge contained in the minor proposition, is of another murder, alleged to have been committed in the month of October, at the distance of several months from the former charge. It is stated to have taken place in Tanner's Close, which is situated either in Edinburgh, or Wester Portsburgh. He alone is charged with that offence; and then the intent is laid precisely as in the former charge,—viz. selling the body to a physician, or surgeon, for the purposes of dissection, or some other purpose, to the prosecutor unknown. Now, my Lords, the third charge in the minor proposition is, murder committed in a different place in Portsburgh, on another day, in the month of October; or, in the usual style, on some other day in the month of September immediately preceding, or November following. In this last charge of the indictment, William Burke and Helen M'Dougal are both included; and after describing the way in which the murder was committed, the intent is laid precisely as in the former charge. Thus, your Lordships see, that there are three murders charged against the prisoners,—one against M'Dougal, and two against Burke, at different times, and different places, without any connexion betwixt these offences. Then there are libelled on five declarations alleged to have been emitted by Burke,—two declarations alleged to have been emitted by the prisoner M'Dougal; and there are farther libelled on eight different articles, against Burke, and six additional articles against Burke and M'Dougal. There is, finally, a list of witnesses to the amount of fifty-five in number.

Now, my Lords, the question is, whether these charges are consistent with the practice of this Court, or the principles of law, in regard to the cumulation of actions, and with that sound and proper discretion which, it cannot be denied on the other side of the Bar, the Court are bound to exercise in all cases of this description? In considering that question, the first and most material point the Court have to attend to, is, whether the prisoner suffers any prejudice from this mode of proceeding? Whether that prejudice is to such an extent as to justify your Lordships in quashing the whole of the indictment, or merely in selecting a part of the indictment for trial at one

time, or in separating the case of one prisoner from the other, must depend in a great measure on the degree of prejudice which the prisoners may be presumed to suffer? But the first point which your Lordships have to consider, is, whether the prisoners suffer *any prejudice* by this mode of procedure? Your Lordships will be pleased to attend to the fact, that it is not charged in the indictment that there is any natural connexion betwixt the three offences;—there is no connexion in law,—no connexion charged,—and there is truly no connexion in any way whatever. With the exception, that the mode of murder, in the three cases, is described in the indictment as somewhat similar; and with the further exception of the intent I have described, there is no pretence for saying that there was any connexion between these crimes. But, although the intent is thus laid in this case, it is not laid *absolutely*. It is either with the intent of giving the bodies for dissection, or, with some other intent, to the prosecutor unknown. Now, my Lords, it is not necessary for the prosecutor to prove, in the case of any one murder, the intent to hand over the bodies for dissection. He may, however, prove this intent as to one, and as to the other two, he may prove that they were done for different ends, for gratifying private revenge, for the purpose of robbery, or in any other way. Nay, my Lords, there is nothing in common charged as applicable to the three cases,—there is no connexion between them, either in time or place, and no specific charge, by which the prosecutor is tied down to prove any natural connexion whatever among them. It is not said that they were committed in the course of any conspiracy between the prisoners, or were the parts of one consecutive or following offence. They are laid simply and exclusively as three different offences, without connexion, and without any species of aggravation whatever. Now, my Lords, the whole train of this proceeding is quite unnecessary for the ends of justice. The crime of murder is different from all other crimes. When followed by a conviction, it *inevitably* leads to the highest punishment of the law. We shall see immediately that there is a cumulation of charges allowed in cases of different kinds;—but I pray your Lordships to keep in mind, that murder is a crime of a peculiar description, and not to be looked to as a mere ordinary offence, of the same general character as those usually charged in the indictments of this Court. Therefore, this being the general state of the matter, let us first look to the case as applicable to the prisoner, William Burke.

The mere fact of charging, on the face of this indictment, three unconnected murders, is of itself sufficient to create a prejudice against the prisoner. If this case were to go on to trial,

your Lordships would, no doubt, direct the Jury that specific and sufficient evidence must be brought forward as to each specific charge. But although the Court were thus to address the Jury, it would be in vain to say that any jury sitting in that box could act upon that distinction. They would necessarily borrow some of the evidence in one transaction, and carry it to another. Although the law might separate the charges, it would be impossible for the minds of the jury to separate them; and although one murder was proved, and the other not, as the facts could not be separated, the Jury would naturally convict the prisoner of the whole. Any light thrown on the murder proved, would be carried to the one not proved. Nay, although neither the one nor the other were proved, yet it might be held, that, on the whole of the transaction, there was evidence against one or other of the prisoners. This is a prejudice arising from the fact of the murders being connected in one indictment; and it is a prejudice against which it is necessary effectually to guard, in looking specially to the case of murder. I must further observe, that in the indictment against Burke himself,—suppose it was possible for the Jury to banish the consideration to which I have referred,—there are three murders charged against him, with *fifty-five* witnesses. We have then seven declarations, five by him, and two by the woman. Although it is quite clear in law, that one set of declarations by one prisoner cannot be used in evidence against another prisoner; yet here arises another important consideration. It is necessary, in point of law, to have them separated, but it is impossible, in fact, that the Jury, under such circumstances, and in so protracted a trial, could separate them. They would unavoidably mix up the whole of these declarations, and mass them together, although the Judge might direct the Jury not to do so. Substantially it is impossible for them to come to such a separation as is essential to the course of justice.

Look next at the case of the other prisoner. The prejudice is still stronger against her. This woman is charged with having committed a murder in October, in company with William Burke, with whom she had no connexion at all. She is actually brought to trial on that charge in an indictment, combining two other charges against the other prisoner, with whom she has no connexion whatever. Where is this to stop? If the public prosecutor may do this, look to the danger of such a proceeding. I am now talking of a grievous case; but if this mode of proceeding were sanctioned, he might go still further. He might combine ten murders in one indictment, in the case of different prisoners—he might combine ten different offences against

ten different prisoners, in ten different counties. Therefore, I submit it is plain there must be some limitation; and I wish to know where this is to end, if the Court may not interfere? I say, here are two murders with which she has no concern. The Jury may mix up the whole together against her, and convict, from circumstances connected with the other murders, with which she is not charged, and as to which she is not put on her defence. Your Lordships see, that in the end of the indictment, there are eight different articles libelled on against Burke, and six against M'Dougal. Just take the first of these articles,—the skirt of a gown. The prosecutor libels upon this against William Burke alone, and it cannot be produced against Helen M'Dougal. But in order to establish the guilt of Burke, the prosecutor, in the *first* place, connects Helen M'Dougal with William Burke; and then he traces the gown into the possession of Helen M'Dougal. It is most evident that the first and second murder can be no evidence of the third: But he calls witnesses to prove that this was the gown of Mary Paterson, the first person murdered, which is thus traced into the hands of Helen M'Dougal. The witness adduced then swears that it is the *gown of Mrs Campbell*, and *not* of Mary Paterson, which is thus adduced against M'Dougal, as conclusive evidence, without being libelled on against her at all. I know your Lordships would say that this must be struck out of *the notes*, as not being evidence against Helen M'Dougal; but it could not be struck out of *the minds* of the Jury. The prisoner, in this way, would also be put off her guard. She saw on the face of the indictment nothing about a gown libelled on against her; and she would not be under the necessity of preparing evidence to show, that though it was the gown of Campbell, yet she came by it fairly and honestly. So you have an article of evidence adduced against the prisoner not libelled upon, and the prisoner put off her guard with regard to the evidence to be produced against her: Therefore, I submit to your Lordships, that a still stronger prejudice exists against her than even against the other prisoner.

Now, my Lords, if such be the case, the question is, Whether this be a legal proceeding? If I have satisfied your Lordships that there is a prejudice against one or other of the prisoners at the Bar, I submit that this is of itself sufficient. It is the undoubted law of this country, that every prisoner is entitled to the various defences which his own particular case may offer; and the more atrocious the charge against him is, the greater ought the care of the Court to

be, that he shall not suffer prejudice from the way in which the charges are brought forward. Let us look then to the authorities which have regulated the practice of the Court on this subject. So far as we can discover from the records of this Court, this is the *first case* in which it was ever attempted, on the part of the prosecutor, to charge, in one libel, three murders, committed at different times. There may be cases where three persons were slain at the same time, as in the case of the Aberdeen Riots, from one discharge of musketry; or there may be the case of a person poisoning a whole family, where, as Mr Hume says, the whole may be charged in one libel, as being part of one foul and nefarious story. If a prisoner suffer a prejudice there, it is only from the number of crimes committed by himself at one time; and he cannot complain. But I say there is no accumulation of crimes charged as committed at *one time* here, but three unconnected murders, committed at different times and places, charged against one prisoner, who is combined with the case of another prisoner, charged with one only of these murders. If there be any authority for this, it is incumbent on the prosecutor to show it. Let us see the cases that come nearest to this. It is not a little remarkable, that in the work of Sir George Mackenzie,—one who is little suspected of being too favourable to the prisoner,—although he states it was the practice of his day, to have an accumulation of offences in one indictment, and that this was not considered illegal; yet he strongly reprobates this as inconsistent with the true principles of the law of Scotland. I read from Part II., title 19, sect. 7. He refers to the *quoniam attachiamenta*. He states, that 'a person accused, was not 'obliged to answer, of old, but for one crime in one day, 'except there were several pursuers—*quoniam attachiamenta*, 'cap. 65, by which accumulation of crimes was express-'ly unlawful, *sed hodie aliter obtinet;* for now there is no-'thing more ordinary, than to see five or six crimes in one 'summons or indictment, and to see one accuser pursue se-'veral summonses: And yet, seeing crimes are of so great 'consequence to the defender, and are of so great intricacy, it 'appears *most unreasonable that a defender should be burdened* '*with more than one defence at once;* and it appears that accu-'mulation of crimes is intended *either to lese the fame of the de-*'*fender, or to distract him from his defence.*' I say, my Lords, here is brought out, in the clearest terms, the just and impartial principle, that the accumulation of offences is burdensome and offensive to the pannel, and that he is not called upon to defend

himself against more than one crime at one time. The accumulation of charges was thus considered an injury even in Sir George Mackenzie's time, as tending to distract the pannel in his defence. Such being the oldest authority, let us look to the principles laid down by Mr Hume. Mr Hume treats of the accumulation of crimes, under three different heads. In the *first* place, he mentions the accumulation of various crimes of the same sort. In the *second* place, he mentions the combination of different crimes, where they are part of the same transaction. Then, *thirdly*, the combination of several unconnected crimes against several prisoners. In the *first* place, your Lordships bearing always in mind, that we have here three unconnected crimes in the same indictment, and two unconnected prisoners—let us see what is said by the learned author: I read from page 166 of the 2d vol.—'In the *first* place,' he says, 'the competency never has been disputed, of charging 'in one libel any number of criminal acts, if they are all of one 'name and species, or even of one class and general description; so as to cohere in this point of view, and stamp a character on the pannel, as one who is an habitual and an irreclaimable offender in this sort,' &c. It is quite plain, that the author does not here refer to murder at all; for he lays down the general doctrine, and recognizes it as affording a sort of '*habit and repute*.' In murder, I do think that one act is quite sufficient of itself; and it never could be meant that it is competent to accumulate charges of this kind, in order to ascertain whether the murderer was, in the language of our author, an '*irreclaimable offender*' in that crime. Therefore, when he treats of this sort of accumulation, the cases which he puts are acts of stealing, housebreaking, or the like. 'Thus, James Inglis was tried on one libel, for three acts 'of horse-stealing, and one act of pulling and stealing wool; 'William Pickwith, for three acts of highway robbery; Thomas Thomson, for three acts of housebreaking; and Walter 'Ross, for two acts of pocket-picking.'—*p.* 166. All cases of housebreaking and theft are crimes of a totally different description from the present. It may be right and proper, in order to have the law administered in a salutary manner, to have small offences brought out at once, but not in crimes of this description. No doubt housebreaking is a capital offence, but it is not of the same kind as murder, and does not lead so certainly to a capital punishment. It is quite plain that this is the principle by which he illustrates his view of the matter; for he refers to two or more acts of pocket-picking. They bear no resemblance to a case like the present. He quotes, under

this passage, no cases of murder; and he confines the illustration to those I have mentioned.

Now see, in the *next* place, what Mr Hume states as to the combination of connected crimes. Here he quotes several cases—some very old. He treats of one of robbery and murder—robbing a post-boy, and murdering him. There was no harm in putting those two charges into one indictment. They were part of the same foul and nefarious transaction; he states, that though the charges may be of different crimes, they are still part of one foul and nefarious transaction, and so may be tried together. But, my Lords, in the present case, there is no connexion in the crimes; and it is not stated that they were part of the same foul and nefarious story,—or that the prisoners were connected with one another,—or that the crimes were planned and accomplished with one and the same purpose;—Therefore, that class of cases are not connected with the present. The learned author goes on to a more complicated kind,—as, for instance, a case of theft, murder, and robbery, committed against various persons, in different years. Then he proceeds to quote cases in 1696 and 1712, some of which I am sure my learned friends, instead of following, in the present day, would hold up as a beacon to avoid. In one case, there were 'ten different species of crime, '—namely, fire-raising,—attempts and threats to raise fire,—'attempts to poison,—theft and depredation,—reset of theft,—'the harbouring, outhounding, and maintaining of thieves and 'robbers,—sorning,—and levying of black-mail,—and the 'killing and eating of other people's sheep. Under which 'different heads he was charged with a variety of separate 'acts, to the number of twenty, committed against sundry 'persons, from 1720 to 1726, and many of them but loosely 'laid in the libel. The Lords thought it proper to restrict 'the trial to the more special charges, and those of the higher 'order, viz. the fire-raising, the attempts and threats to raise 'fire, and the attempt to poison.'—*p.* 168. I am sure such a charge as this would not be followed in the present day. Therefore, I quote that case, in order to show your Lordships that it does not come within the principle Mr Hume lays down as to the case of crimes limited to one person, and it is for your Lordships to say, whether or not, in other respects, this is a case to be followed in the present instance. Even here some of the charges were passed from. In like manner, in other cases, when they find such accumulations to be oppressive, they proceed to the trial of as many of the articles as they can overtake, and dispatch them. I may mention to your

Lordships that there is a case in 1784, where the Lord Advocate did depart from several of the charges.

I may next call your Lordships' attention to what Mr Hume says under the third head of accumulation against several persons. I have already stated to your Lordships, that where any prejudice exists in the minds of the Jury in the case of one prisoner, he is entitled to the remedy of separation. But it is plain Mr Hume considers the union of several prisoners charged with different crimes, to be illegal. Observe what he says in regard to several prisoners charged in the same libel with several unconnected crimes. It is quite true that the learned author puts a case, John for murder, James for theft, and George for forgery, which he says is incompetent. But I ask your Lordships, would it not make any difference in principle, that John should be accused of one murder, and James of another, in the same indictment, in place of John being accused of murder, and James of theft? The last would not appear to me to be such a strong proceeding as the former, though Mr Hume says it is illegal.—*p.* 171.

Mr Hume next quotes the case, in 1784, where there were four prisoners, to which I already alluded. Two of them were charged with a riot on the 4th of June, and the other two for another on the 7th of 'the same month. The charges in the 'libel were here so far distinct, as no one of the pannels 'was accused of being accessory to both tumults, but to one of 'them only. In consequence, at calling the libel, and though 'no objection had been moved, the Lord Advocate represented 'to the Court, that the form of the charge appeared to him to 'be, in this respect, improper; and he therefore craved permis-'sion to desert the diet, as to the riot of the 7th of June, and the 'two persons charged therewith; which was allowed accord-'ingly.'—*p.* 171. There the Lord Advocate thought it his duty to pass from one of the charges, and, in the *first* place, proceeded with the others. I know Mr Hume says, that as our law stood formerly, the public prosecutor was warranted by the practice to have proceeded. But I pray your Lordships to observe, that this was done in 1784. And then, in what way does the learned author describe the cases? He quotes a set of cases in 1696, 1717, 1718, and one in 1783. What sort of cases are these? The oldest one is in 1696, viz.—'Patrick 'and James Faa, father and son, where the libel charged 'both pannels with a murder and a forgery, and the father only 'with several other crimes.'. And then one in 1717, where certain ministers were prosecuted on the same statute, for entering into their respective kirks, viz.—'Alexander Robertson, 'and seven persons more, all of them Episcopal ministers,

'who were prosecuted on the same statute, and for the same 'sort of crime, of which they had severally been guilty, by 'intruding into their respective kirks, and exercising the pastoral functions there, after lawful sentence of deposition. The 'case of George Fairly, and two persons more, indicted on the 'toleration-act, and the other laws in that behalf, for officiating 'as Episcopal ministers, without recording their letters of 'orders, or praying for the King. The like in the case of Alexander Robertson, and five others, indicted for officiating as 'Episcopal pastors, without having duly qualified and complied 'in terms of the statutes; and for leasing-making, in praying 'for the Pretender, either directly or in equivocal terms, at 'different times and places. Further, the libel, in this case, 'bears a separate charge against Robertson alone, for drinking 'the Pretender's health; a charge against William Duguid 'alone, for clandestine marriage; and a charge against four of 'the six pannels, for violently and riotously taking possession 'of a church: All which articles were remitted to an assize 'along with the others, probably because those several offences 'agreed in this circumstance, that they *all savoured of Jacobitism and non-conformity*, or were injurious to the discipline 'of the church, and were imputed to persons of one class 'or calling. The case of David Strang and William Wyllie, 'is another instance of the like character: The libel here 'went to trial against Wyllie, for three acts of clandestine 'marriage, and against Strang, for one irregularity of the same 'sort, which was quite unconnected with the others: A 'strenuous opposition had been made to it, on the part of the 'pannels.'—*p.* 172.

I do not think any of these last were crimes of a very atrocious nature. A charge of three acts of murder is very different from a charge of three acts of *non-conformity*. It savours of something worse than Jacobitism. But there are none of these cases subsequent to 1784,—nothing to show why the prosecutor ought to have proceeded with one set of prisoners, without going on with the other. The only thing mentioned by Mr Hume, which could have justified a contrary course, was these old cases. There are some others, but it is unnecessary to refer to them, as they are all of the same description. He says, that in later times, instances are still to be met with, though not so strong or so numerous. Then, he quotes the case of Clark, Calder, and Donaldson, 'where the indictment 'was for one act of shopbreaking, in which all three were concerned,—and for another done by Calder and Donaldson 'only. But both shops were situated in the same town, and 'were broken about the same time; and the three pannels were

'all of them soldiers;—Clark and Donaldson in the same re-
'giment and company: It appeared too in evidence, though
'not mentioned in the libel, that they were in a course of shop-
'breaking, and sharing their profits. For these reasons, the Court
'repelled an objection which was stated to the libel.'—*p.* 173.
Next, he quotes a case where there are two persons engaged
in one act of housebreaking,—and another in another act
of the same kind;—but he quotes no cases of murder. Even
in the case of the housebreaking referred to, there was a clear
connexion. It is thus stated:—'The like plea was urged,
'but with as little success, in the trial of Archibald Stewart
'and Charles Gordon. Stewart was charged with three acts
'of housebreaking alone in Edinburgh, and Gordon with re-
'setting the stolen goods on these several occasions: And
'Stewart was further charged with one act of housebreaking
'alone at Nidpath-Castle, in the county of Peebles; in which
'instance, the spoil had not come into Gordon's hands. But
'it was related in the libel, that Gordon was married to Stew-
'art's sister, and that both were habite and repute to be thieves;
'and it appeared from this train of resetting the booty made by
'Stewart, that Gordon was under a compact to assist him in his
'thefts.'—*p.* 173. So here they were charged in the libel, as hav-
ing a connexion with one another; and although they were not
connected in the last act of housebreaking, they were connected
in being habit and repute thieves, and concerned in a general
system of depredation. But here we have a case totally dif-
ferent from any which can be brought forward on the other
side. Here there are charges without any connexion, and
prisoners without any connexion; and yet they are charged
conjunctly in one indictment. Therefore, to obviate all pre-
judices in the minds of the Jury, the Court are entitled to give
such remedy as they think fit, under all the circumstances.
I may mention another class of cases, where it is common for
two prisoners, although charged together, to be separated the
one from the other. Such a course is always followed, where
the one may give evidence on behalf of the other. This has
been frequently done. Your Lordships will remember the
case of Surridge and Demsie. Therefore, we go back to
the great principles which are laid down in the emphatic words
of Sir George Mackenzie, viz.—'It is unreasonable that a
'defender shall be burthened with more than one defence at
'once, or distracted in his defence.' That is the principle
which runs through all our decisions;—and I must take
the liberty of saying, that if there was ever a case where a
sound discretion would be exercised in separating the charges,
it is the present. The very circumstance of there being mur-

der charged here, is of itself sufficient to justify the course. But there are three murders charged with one intent, which is stated, although not stated absolutely; and, although the public prosecutor was not bound to state any intent at all, he has introduced that species of *intent*. Yet, he has been pleased to do so, when it is matter of public notoriety, that the minds of men are excited in an unusual degree upon this very subject. God forbid that I should suppose that this would prejudice your Lordships, or the respectable Jury that is to try this case. But it is a circumstance which your Lordships cannot overlook; and I say that no Jury should be impannelled under an indictment calculated to awaken such prejudices. It is but fair to the prisoners, and necessary for the administration of public justice at large, that they should be tried in a cool and deliberate manner, not upon the three charges in one indictment, but upon one charge alone. This is not a case where your Lordships are now to make a precedent diametrically opposite to the humane principles of the law of Scotland, contrary to the more ancient practice of our law, and contrary to the better practice of the present times.

Finally, I am aware that it is not usual to refer your Lordships to English authorities in this Court,—I am aware that your Lordships are to look to the law of Scotland; but I hope I am not detracting from the authority of your Lordships when I refer you to that law. It surely cannot be wrong to ascertain how those persons would be dealt with in the other end of the island,—and there I understand the practice is uniform, —not to combine two felonies against one prisoner in the same indictment. I see it is laid down by Lord Ellenborough, in a case which was tried in 1809, a case of various acts of fraud. There the counsel for the prisoner took an objection to the charge.—Lord Ellenborough says:—'It is usual in felonies, for the Judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that.' And, accordingly, Mr Chitty says distinctly, at page 252, vol. 1st, 'In cases of Felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment.' And, if more are charged, the Court will quash the indictment.—Observe the reason, 'lest it should confound the prisoner in his defence, or prejudice him in his challenge to the Jury.' These are cases where one prisoner will not be charged with many crimes; and the principle is the same which guides our practice,—namely, the prisoner would be prejudiced in his defence, by an accumulation of offences; although, in point of law, they may be combined in one indictment, the Court will quash the

indictment, lest the prisoner should suffer in his defence. My Lords, in addition to this, Mr Chitty points out, that it may prejudice the pannel in the choice of the Jury. The same applies here. If the charges had been separated, we would have had twenty challenges: If they are not separated, we are limited in our number of challenges. I do not say there are objections to the respectable Jury, with whose names we are furnished; but there might be;—and we say we are deprived of our rights and privileges. When your Lordships look, then, at this case, in all the aspects I have set before you—when you see that there are accumulated and combined charges against different prisoners—when you see the atrocious nature of these charges, the number of the witnesses, the declarations, and the number of the articles libelled,—and when you see the humane and salutary principles of our law, and the practice of this Court,—your Lordships will not be inclined to form a precedent, which, in the *first* place, would be injurious to the law of the country; and, in the *next* place, would be injurious to the unhappy persons now brought to this bar.

Lord Advocate.—My Lord Justice Clerk, your Lordship has heard these objections stated, with that talent and zeal which is ever exhibited by my honourable and learned friend, when he appears, as on the present occasion, gratuitously to defend persons accused: But when the objections which have been stated are looked at in a legal point of view, and the authorities on which they rest are considered, I am persuaded that you will concur with me in thinking that they are entirely unfounded. It appears to me that my learned friend has mixed two objections together, which should be considered separately. The first objection relates to the bringing two prisoners to trial at the Bar of this Court, upon one indictment,—the other, with charging one individual, in the same indictment, with three distinct and separate acts of murder. Now, my Lord, I mean to deal with these separately; and I shall deal very shortly indeed with the first. This woman is charged in this indictment, as having been guilty of the crime of murder, along with the man, in one of the three instances charged; and the libel accordingly, after narrating the two preceding acts, charges her as joint actor in the third. I think I could completely defend that proceeding, and show that it is sanctioned by the law of the country, and by numerous precedents. But I state to your Lordships, my object in putting her in that indictment was, that she might derive advantage from being so placed. I will not detain your Lord-

ships, by detailing those advantages, which must be obvious to all, further than to notice, that if I had charged her in a separate indictment, and had tried the man *first*, and afterwards the woman; adducing against her the same, or nearly the same evidence, which had been previously adduced against Burke; she could not have come here to this bar, in the same unprejudiced state, after the public had thus heard the evidence against her, which she would now appear in, if the case, as against her, was to go to proof. I think that that prisoner would have had good reason to complain of the public prosecutor, if he had acted in the way which my learned friend recommends, by first leading evidence in the trial of Burke, as against her, and then bringing her to that bar, and repeating the same evidence a second time.—In that situation, I thought it my duty, in justice to her, that she should appear included in this indictment. But she, my Lord, makes the objection; she says that she will be prejudiced. God forbid, that any person holding the situation I do, should do any thing to prejudice a prisoner on trial. The very contrary motives guided my conduct in framing this indictment in the way I have done. The question is now reduced to one of time and of trouble; for, if I do not proceed against her to-day, she will be proceeded against ten days hence. In such circumstances, I shall certainly not insist now on that woman's being tried on this indictment. I shall proceed against her alone, since she now says, that being tried on this indictment, will prejudice her cause. But if she shall suffer prejudice from the evidence in Burke's trial going abroad, let it then be remembered it is not my fault. She and her Counsel must look to that—it is their proceeding, not mine.

As to the second objection, whether or not I am entitled now to go to proof on the three charges here exhibited, or shall proceed *seriatim*, I am aware that this is matter of discretion with the Court. In so far, however, as depends upon me, I declare that I will not consent to this being dealt with in the last of these modes. No motive will induce me, for one moment, to listen to any attempt to smother this case; to tie me down to try one single charge, instead of all the three. If I had confined myself to one of those charges;—if I had served the prisoner with three indictments, and put the pannel to the hardship of appearing three times at that bar, I would have done one of the severest acts that the annals of this Court could show. I am told that the mind of the public is excited; if so, are they not entitled to know, from the first to the last of this case? and is it not my duty to go through the whole

of these charges. I would be condemned by the country if I did not, and what to me is worse, I should deserve it; and such being the result of my determination, I shall now submit to your Lordships the grounds upon which I conceive the objection must be repelled.

This indictment charges William Burke with three separate acts of murder. It charges him, in the major proposition, with murder. I humbly conceive that the libel contains no aggravation. These murders, my Lords, are detailed, as your Lordships see, as having occurred within the last six months—the one in April, the other in October, and the third in November. Your Lordships see that they were all committed in this city—one in the Canongate, one in Tanner's Close, and another in the house of this prisoner,—both these last in Portsburgh—both within fifty yards of one another; and they are charged with having been done with the same intent. I say that intent is no aggravation of the crime. The crime charged is murder, which it is impossible to aggravate by any statement you can make. The intent is stated with the view of its appearing on the record of the Court, what the real motive of this crime was. My friend says, that I have not only stated the intent, but also with some other intent. The Court knows that when we libel intent, the intent is that which we know, and which the Court expects from us; but there may be some collateral circumstances which those other general terms are meant to cover. Thus, my Lords, these cases are all of the same degree—the same description of crime—all committed within a very limited time—within a very limited space, and with the same intent;—and the question is, whether there is any thing in sound sense—in the law of this country, or the authority of this Court, which excludes me from thus laying the libel? I am told by my learned friend, that this is the first case that has occurred where three murders have appeared in one libel, and it is with pain that I acknowledge the truth of the statement. It is with sorrow I admit that there is not only no precedent of such a thing in the annals of this Court, but in the annals of any civilized country whatever. That an individual should have been found capable of committing three distinct acts of murder, is a thing unexampled, and almost incredible. The occurrence has been left for our day, and for our country, and must thus for the first time be dealt with. But repeated instances of other crimes, of a capital nature, have been committed by the same individual, and the same rules must apply to both. These rules are, that wherever the crimes are of the same description and character, they may be tried on the same indictment. My friend has referred to a variety of authorities on the same subject; I humbly conceive that they will all be found to bear against him. The first is that of Sir George Mackenzie, which applies to the case of individuals having three

different summonses, at the instance of three different complainers. He says, "a person accused was not obliged to answer, of old, but for one crime in one day," &c. (*Vide* Mr Robertson's speech, page 16). That more than one summons should not be exhibited the same day,—that is the true import of this passage. Now, my Lords, I would like to direct your Lordships' attention to the authority of Mr Baron Hume (page 166, vol. ii). This author says, "the incompetency has never been disputed, of charging in one libel, any number of criminal acts, if they are all of one name and species, or even of one class and general description, so as to cohere in this point of view, and stamp a character upon the pannel, as one who is a habitual and irreclaimable offender of this sort." Now, your Lordships see that my indictment falls directly under the law laid down here by Mr Hume; the crimes are all of one name and species, all of one class and description, and stamp a character upon the pannel, which a jury and the Court are bound and entitled to look to. The prisoner is entitled to all fair means of defence, but we must look to the interest of the country; if we were to be excluded from bringing before a jury the whole extent of the guilt of the individual, such guilt being always confined to one name and one description, the consequences to the administration of justice would be most prejudicial. Mr Baron Hume goes on to say, "thus James Inglis was tried on one libel for three acts of housebreaking, and one act of pulling and stealing wool, William Pickwith for three acts of highway robbery, Thomas Thomson for three acts of housebreaking, and Walter Ross for two acts of pocket-picking. Indeed, there is no instance, so far as I have observed, of the distribution of the several charges into separate libels in situations of this kind." These authorities all appear to be so decisive against my learned friend, I am surprised how he could have referred to them. My learned friend says that he sees no authority for accumulating such charges: I see no authority for separating them. According to Mr Baron Hume's authority, the separation of such charges is unexampled in the annals of the criminal court. Your Lordship will see the hardship to individuals, if they were to be tried day after day for crimes of the same description, instead of being put at once to their trial for the whole. The same rule applies on all these occasions, where the criminal acts, though of different kinds, have a natural relation and dependence on each other; and accordingly, notice is taken by Mr Baron Hume of a case of great importance, that made a great noise at the time,—the case of Nairne and Ogilvie, accused of incest, adultery, and poisoning the female's husband. In this case the objection was taken, and was expressly repelled. Mr Baron Hume also mentions that the same objection was repelled in the case of John Irvine, where he was charged with five acts of robbery, each of them capital crimes. Thus, this

objection has been repeatedly stated, and repeatedly repelled by the decision of this Court. If such decisions are not to regulate your Lordships, I do not know in what way the actions of men can be regulated. In criminal matters, beyond all others, precedents ought to be strictly adhered to. There are a variety of other passages to the same effect; and I would just refer your Lordships to the daily practice of this Court in this matter. I would refer your Lordships to the case of James Martin, where a man was tried and convicted for four housebreakings. I would refer your Lordships to the case of Donaldson, tried for theft, reset, housebreaking, and theft,—all separate acts. I would refer you to the case of Beaumont, at Aberdeen, in 1826, where six different acts of housebreaking were charged, and the man sentenced and executed. I would refer you to the case of Gillespie, at Aberdeen, in 1827, where he was tried for nine acts of forgery, and executed; and I would refer you to the well-known case of Surridge, 7th November, 1820, which occurred at Greenock, where a man was indicted for two different acts of murder, and where the acts were committed at the distance of an hour from each other. These authorities and decisions of your Lordships, and the practice following upon them, must guide this matter now.

With respect to the reference made to the law of England to cases of this sort, the passage which my friend referred to, instead of being for him, is against him, and can only lead to the conclusion for which I have thus contended. Lord Ellenborough says—"In point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground either of demurrer or arrest of judgment."—(Chitty, page 253). This is precisely our law on the subject; but English practice certainly cannot rule the decisions of this Court in criminal matters, which have been fixed and decided so wisely, so long, and are so perfectly understood. On the whole, this objection ought to be repelled, and I ought to be allowed to proceed to trial against Burke, on the three different charges for murder contained in this indictment.

Dean of Faculty.—My honourable and learned friend opposite may rely on this, that none of us on this side of the bar entertain the smallest doubt that he has brought this case to trial in the manner that he thought best calculated for justice. On the other side, I know he will give us credit for this, that we state this objection from a firm conviction that it is essential for the ends of justice that it should be sustained. I was surprised at one observation of my learned friend, in concluding his speech, when he mentioned to your Lordships that it was of infinite im-

portance that the decisions and practice of this Court should be adhered to; and yet candidly admitted to us, that this is the very first example on the whole record of the Justiciary Court of an indictment in the case of murder being so framed. *Accordingly, this is the very first example* of three or two separate or unconnected murders, alleged to have been committed at different times, places, and circumstances, being put into one indictment. No such instances can be produced; and are we not justified in representing to the Court that which is scarcely denied to be a relevant ground of objection—that the prisoner might sustain infinite prejudice in his defence, if he were to be put to his trial on this indictment with all the concomitants with which it is connected? If I understand my friend right, he means to desert the diet *pro loco et tempore* as to the woman, the hardship as to her being self-evident; and therefore her interest is not now before your Lordships. But the question remains, and I trust it will appear to your Lordships that it is a question of importance, whether the interest of the male prisoner is not infinitely prejudiced by the form in which this indictment is framed. If I understood my learned friend, this indictment was framed for the purpose of producing an effect which, I shall submit to your Lordships, is clearly calculated to lead to the greatest injustice to this prisoner. Therefore, let us see what it is that the prosecutor insists on passing to the jury. He makes an averment in this indictment that three murders have been committed. We shall submit that there are sufficient grounds for not putting the prisoner on his trial upon any of these charges under this indictment. Your Lordships will assume, in the first instance, not only that the prisoner may be innocent of each and all of these offences, but that he is innocent of them. We are entitled to the benefit of the ordinary presumption, that a man is not guilty of the crimes that are charged against him till these crimes are substantiated by clear, undoubted, and positive evidence. If he only get the benefit of that principle, granting that the prosecutor is only doing his duty in bringing him to trial for any offence which he is supposed to have committed, let us see whether this form of the indictment is calculated to do the plainest justice to the accused. There are three charges of murder:—one said to have taken place in the Canongate of Edinburgh, in the month of April 1828; another in October, said to have taken place in the house of a person of the name of Hare, in Portsburgh; and another on the last day of October, in a different place in Portsburgh, in a house said to be inhabited by the pannel. Now, my Lords, these are separate charges of the murder of course of different persons, totally unconnected with one another, living in different places, found in different places, and in different circumstances; and the last of these acts is said to have been committed in conjunction

with a third person, who is not stated to have any connexion with the other acts. Supposing that the prosecutor is in a situation to prove one of these murders, I need not tell your Lordships that that will infer the death of the pannel. If he is in a situation to prove any one of them, it will lead to that result. And I need hardly say, that in such a case it will lead to it infallibly. Now, my Lords, I ask for what purpose are we to have three murders crammed into one indictment? If the object is to see, whether the man has committed the crime of murder or no, this must be done by proving a specific act of murder by facts which must and can relate to it alone. If the prosecutor is in a situation to prove one such case, where is the necessity for putting another separate charge of a different murder. There is plainly no such necessity. If we go to trial in this case, and if evidence is brought for the purpose of proving him guilty of one of these murders, and the prosecutor totally fails to prove it, or leaves that case in such doubt of the guilt of the pannel as to entitle a jury to give a verdict of not guilty, or not proven; —most assuredly, my Lords, if that should turn out to be the state of the case, it could never for a moment be pretended, that that *attempt* to prove the pannel guilty of one murder of which he must be acquitted, could be used as a circumstance of evidence to prove him guilty of the other. Will any body say that a false charge, or a charge that turns out false in the evidence —a charge upon which the jury might say he is not guilty—is to be taken to prove a separate and distinct murder? Surely it is impossible to maintain that. And if no such argument could be used, what, then, is the purpose to be served, by putting three several murders into one indictment? My learned friend says he considers it for the advantage of the prisoner, because he might otherwise be exposed to one trial after another. But we must be allowed to judge of that, and we have fully considered the matter. Each case of murder must be proved by its own facts, and a *talis qualis* proof as to one cannot legally be allowed to operate as a make-weight in proving the other. The injury, therefore, which the pannel sustains by this form of indictment is manifest. You cannot lay that indictment before a jury, without necessarily producing prejudices in their minds from the very fact that he is there gravely charged with three separate murders. Accordingly, my learned friend at last comes to a point. I beg pardon if I am wrong, but as I understood him, he candidly spoke out that he thought it his duty to put all the three murders, and to include both the man and the woman, in one indictment, because an attempt to separate them would be an attempt to smother the charges that were brought against the prisoners:—that is to say, that though the several murders are charged specifically as separate crimes, the prisoner is not to be tried on each

on its own merits, but he is to answer to them all at once as making up, by a supposed connexion between them not charged in the indictment, some general charge of the crime of murder. It is said, that by this objection we are endeavouring to smother the disclosure of the whole *story*. What is meant by this *smothering?* The Lord Advocate is undoubtedly entitled to bring the prisoner to trial on all and each of these charges. We are doing nothing to prevent this. But if the meaning be that we are desirous, while under trial for one murder, to keep back from the jury all facts relating to some other murder totally unconnected with it, I say that in this sense we are entitled to do so, and justice requires that such a smothering of the assumed story should take place. For what does it amount to but an attempt to prejudice the minds of the jury by facts confessed to be irrelevant? The nature of the charges themselves is sufficiently calculated to excite unfair prejudices, originating as they are said to do in circumstances which unavoidably affect the best feelings of the public. But it is the duty of the Court to take care that nothing in the mode of trial shall be permitted to aggravate or give force to such illegitimate impressions. And it is precisely *because* it leads to an assumed connexion between the charges, which is not libelled, and could not be libelled, that we say it is not a legitimate mode of putting the prisoners on their trial. It is said, that all the acts were committed in one place—in Edinburgh. But this will never do. There are here three separate places—three distinct *venues*—laid, just as certainly as if one act were in Edinburgh and another in Orkney. They may be said loosely, out of doors, to have all happened in one place. But *here* we speak of the *locus* technically, and it must be looked to in each case with legal precision. In the same manner, the crimes are totally separated and unconnected in regard to the time of their commission. My learned friend says, they are *only* at the distance of six months from one another. Is a distance of six months a slight separation of time in such a matter? One murder is said to be committed in April—another in the beginning of October—and a third on the last day of October or the first November: And all these are put into one indictment. Is there no prejudice to the prisoner here? Suppose I wished to prove an *alibi* as to one or more of them: Is the prisoner not put to an unreasonable difficulty in having to meet three such charges in one trial? The difficulty of ascertaining the facts, and the danger of their correct application, is infinitely increased. I may have an *alibi* as to one—in another there may have been no murder committed—in a third it may have been committed by a different person. But the prisoner is to be perplexed in his preparation, and the jury are to be perplexed in their consideration

of the case, by the mixture of the whole together, till at last they may be unable to see the bearings of the evidence in each case, and he may be convicted upon the mere impression of guilt from the multiplication of charges, without any sufficient evidence in any one of them. The acts charged, then, being perfectly separate in place, and time, and circumstances, what remains to connect them? My learned friend admits, that he has not libelled it as an aggravation, or in any way as to the nature of the offence in the major proposition, that the several acts were done in connexion with one another. But he says, and it is true, that he has libelled as to each in the minor proposition, that it was done *with the intent* to sell the body for dissection, The charge is, that the act was done with the intent of disposing of the dead bodies for dissection, or *some other felonious intent* to the prosecutor unknown. It is said that these last words must go for nothing. Does my learned friend mean to say that he would fail in his indictment if he did not prove the specific *intent* that is laid there? This intention is laid, I think rather irregularly, in the minor proposition, as the motive for which the thing was done: That motive, by the law of Scotland, is a separate crime; and in a late case, it was held, that it was not competent to charge or prove one crime (embezzlement) as the inducement to the commission of another (fire-raising), where there was no substantive charge of it in the major proposition. But waiving that, I suppose it cannot be maintained that the prosecutor would fail in his indictment by failing to prove that specific intent under their indictment for murder. If he proves the murder itself, he is entitled to prove any intention, any motive that led to it. And what could the pannels' counsel say, if it should appear that one of the murders was committed for a different purpose—for the purpose of robbery, or concealment of some other crime? It would evidently be no defence, that that motive was not specially libelled. If they prove the particular case of murder, what signifies the particular intent? The motive will not palliate it in the slightest degree, unless it comes up to that sort of impulse which will produce a justification or reduce the offence to culpable homicide. But suppose that the basis of my friend's argument were granted to him, and that this libelling of the intent had the effect of connecting the charges of this indictment, the thing of which I complain is avoided. I complain of it precisely because the indictment is so framed as evidently to produce the impression on the minds of the jury, that there is such a connexion between the separate acts, though there is no such direct charge in it. If my learned friend had so libelled it, we should have been upon a different question, Whether it was a competent charge at all or not? therefore, upon this indictment

he is not entitled to make that case, because he has put his libel in such a form as to admit of the discussion of that question. These are the views, in point of principle, on which I submit that this indictment should not go to trial. The plea on principle has been clearly supported by authorities; but before going into them, let me say a word more of the prejudice that the pannel must suffer, to which I have heard no answer. There are three charges of murders, at the distance of six months, in different places—the prisoner is put to his defence *fifteen* days after receiving his indictment —he is examined and re-examined—five declarations libelled—perplexed and confused by these various charges, and now called on to speak to a list of fifty-five witnesses: I ask your Lordships, is he not prejudiced in his defence by such a form of procedure? It evidently exposes him to great and unusual difficulty. I think that there is great room for objecting to the competency of it. But I do not at present say, that it will or will not be a sufficient reason for quashing that indictment, and directing a different course. I am, at all events, entitled to speak to the discretion of your Lordships, and I humbly submit that, taking it in that light, there is the most serious ground for the exercise of that discretion in this case. It is further evident, as mentioned in the authority quoted from the law of England, that the prisoner may be prejudiced in his challenges of the jury; and, my Lords, as the legislature has thought that of so much importance as to make it the subject of an act of parliament, it is to be presumed that the pannel has an interest to preserve it unimpaired. We do not at present know who the jurymen may be that may sit on this trial. We mean no offence to any individual; but, speaking of the abstract principle and right, it must be of importance to the pannel to have the use of all the challenges that he may have upon this trial: If he use them all, he would in separate trials have a right to make fifteen challenges, that is to say, five gentlemen on each of the lists of the jurymen that were to be drawn out of the box. Can it be denied, then, that he is prejudiced in this point, if the prosecutor combine all the three charges in one indictment? In the law of England, I believe the prisoner has twenty challenges in such a trial; and yet we see that the effect in lessening them is taken by the English Judges as a serious reason for not putting a prisoner to trial on two crimes in one indictment. Still farther, there may be jurymen liable to be challenged *for cause* in one case and not in another. Again, there may be bad witnesses in one case, who are good witnesses in another; they may be liable to challenge in one case, and not liable to challenge in another: They might thus be examined to a certain extent upon one case, and though possessed of material information affecting another charge, could be examined no farther. On the whole, therefore,

in every view that can be taken of the principle, and the justice of the case, the argument is clearly in favour of the objection. Then let us see whether there is authority for it. The first, my Lords, is the express authority of Sir George Mackenzie, which was fully explained by my learned friend. Sir George Mackenzie says:—(*Here the learned counsel referred to the passage formerly quoted by Mr Robertson, see p.* 16.) Is not that the very case of forcing a man to go on his defence for more than one crime at a time, whereby he may be distracted, and injured in his defence? That is the doctrine Sir George Mackenzie laid down a century and a half ago. My learned friend says, that this relates to the case of several prosecutors. But it is clear that it does not. The passage in the *Quoniam Attachiamenta*, referred to, is in these words:—'Si 'quis *per aliquem* calumniatus fuerit, non tenetur respondere 'uno die, nisi de una appellatione; aut de uno delicto; nisi 'sponte voluerit. Sed *si plures personæ* eum appellent, de di-'versis calumniis, pluribus respondere tenetur.' The first case here stated, is clearly that of *one* prosecutor; and it is of that case that Sir George Mackenzie speaks. What authority is opposed to this? My learned friend has referred to the passage in Mr Hume; but Mr Hume's authority, rightly understood, is very much in favour of our argument. He says:—(*See Mr Robertson's speech, p.* 17.) So, my Lords, the case is a case of housebreaking and theft; and he says,—'The 'same method shall be good with respect to those criminal 'acts, which, though distinct in themselves, are, however, 'charged as evidences and instances only, to make out one 'genuine crime, such as sorning, harbouring of thieves, fore-'stalling, oppression, or the like,' p. 166. That doctrine we have no occasion to interfere with, though there may have been examples of it not of the very best kind. But your Lordships will observe that these offences, though some of them are capital, are still very different from the charge of murder; for, even in the case of housebreaking, the libel may be restricted to an arbitrary punishment. But I think my learned friend would scarcely restrict a charge of murder to an arbitrary punishment: The charge itself may, indeed, be restricted to *culpable homicide;* but, that is a change in the nature of the crime itself. Would any prosecutor go to trial before a Jury, on a charge of murder, and restrict the indictment to an arbitrary punishment? I apprehend not; and, in this respect, the crime of murder stands by itself, and cannot be compared with any other case. But Mr Hume goes on to say,—'The like practice is naturally observed on all 'those occasions, unhappily too frequent, where the crimi-

'nal acts, though of different kinds and appellations, have a 'natural relation and dependence, as parts of one foul and ne-'farious story,—as successive steps of the pannel's progress in a 'course of increasing guilt, into which the indulgence of one 'criminal passion has betrayed him.' This refers to the case of a prisoner accused of connected and progressive crimes, —charges, for example, of robbery and murder, where these crimes take place at the same instant, or are part of the same transaction,—where they have a connexion with one another. I do not dispute the correctness of putting them in one indictment in such a case. But such examples bear no analogy to the present case. Yet, even in those cases, your Lordships will observe what Mr Hume expressly says,—'In 'like manner, the Court, whensoever they find that the im-'mediate trial of such manifold charges is *likely to prove* '*oppressive*, either to the witnesses, the Jury, or them-'selves; and *still more, if they see cause to believe that it* '*may embarrass the pannel, or beget prejudice against him,* '*in the minds of the Jury;* and more especially still, if it 'appear that it was truly the prosecutor's object to lay 'him under such a hardship:—In any of these cases, they 'have it certainly in their power to divide or parcel out the 'libel, and proceed in the first instance to the trial of as many 'of the articles, as may fitly be dispatched in a single diet, 'reserving the others for trial afterwards.' p. 168. And then he quotes cases on that point. After this, the learned author states *his opinion* distinctly against the practice of charging, in one indictment, one person with one offence, and another with a separate offence, unconnected with it, though in conjunction with the person accused of the first: And as he refers to the express authority of a case in 1784, showing the approbation of the Court of the conduct of the prosecutor, in declining to proceed with an indictment, which was framed on that principle, I think his clear opinion is entitled to some weight with your Lordships. To be sure, there are instances the other way. My friend says, in 1696, 1717, and 1733, it was the practice. Several charges in one indictment, and directed against different parties, were sent to trial, and that this was the practice in those times. I just answer that by saying, that if your Lordships' predecessors thought proper to do those things in such cases,—to send, for instance, a charge of ten separate crimes to trial at once,—surely it will not be seriously maintained that that practice is to rule your Lordships in cases of this description, now. If they would not rule your practice generally, why are they to rule your Lordships in a case like the present, as to which it is *admitted that not one precedent in any*

period can be produced? This accumulation of these erroneous charges, in cases of this kind, is like no other, because they must produce prejudice to the prisoner. There is indeed but one case adverse to the cases in 1784, Fraser, Macgregor, Anderson, and Paul, which is of a later date, *(vide Mr Robertson's speech, p. 19)*, and that of Stewart and Gordon, in 1785, *(cited p. 21)*.

LORD MEADOWBANK.—That was the case of several individuals.

DEAN OF FACULTY.—I am aware of that. But I wish to observe, that in that case the charge was that of *theft* and *reset*,—crimes having a natural connexion; and the whole matter was, that one of the prisoners was charged with reset in two of the cases, and not in the third. But they were both charged with being *habit* and *repute* thieves; and it was also distinctly libelled, that there was a compact amongst them, for the purpose of committing their crimes. My Lords, my learned friend wished to rest something on a single case of two murders: It is in vain to refer to that as a case. The case of Surrage was the case of a soldier, who had been engaged in a contest with the town's people, in which more than one person was killed. One charge was, that of wilfully discharging fire-arms in the street; and the other was a charge of murder, committed in the fray on that occasion. It is quite clear the acts there were not unconnected homicides, but all parts of the same transaction. They were all charged as done at the same time—in the same riot; and there was no difference between that case and the case at Aberdeen.

LORD MEADOWBANK.—Discharging fire-arms, and murder.

DEAN OF FACULTY.—The charge of firing was found not relevant: It was struck out by the Court.

LORD MEADOWBANK.—It was just one act: They were both caused at the same time—though one died at one time, and another at another.

DEAN OF FACULTY.—So it is quite plain, my Lords, that these cases cannot apply to the present case. Now, my Lords, before I sit down, I may, with the utmost deference, request your Lordships' attention to the principles that are entertained by the English Judges. My friend says there is nothing in the

law of this country that renders it *incompetent* to put the indictment in these terms. I am not desirous of pressing the point to the question of mere competency in the abstract; but I submit to the Court, whether they will, in the exercise of a sound discretion, allow the indictment to go to trial in this form, where no precedent of such a thing having been allowed, is produced. In the observations of my Lord Advocate on the law of England, he had surely not attended to the passage cited by Mr Robertson from Chitty, which says, expressly, that there is no strict law against laying various crimes in one indictment; and, therefore, if not taken notice of before trial, it will not be a ground for setting aside the verdict, or for arrest of judgment. Notwithstanding this state of the law, the rule of practice is fixed, in all cases of *felony:* It is not extended to the case of misdemeanours; but, in the case of felonies, the rule is, that no more than one offence should be regularly charged in one indictment.

Lord Ellenborough's doctrine is quite clear to this effect,—it is all the stronger for us that he lays down the strict law of mere competency, as my learned friend states it; but still, he says it is usual in felonies to call on the counsel for the prosecutor to select one felony; but the practice has never extended it to misdemeanours. Now, my Lords, this is not only a felony, but the highest species of felony. I ask, then, whether your Lordships will, with an indictment prepared in this form, so manifestly calculated to injure the prisoner, without any ultimate benefit to the justice of the case, proceed to trial? I need not say to your Lordships, that this is a very serious case;—of that there can be no doubt in the mind of any person that has read the indictment. My friend says, that it has never occurred in his time, that there were three murders charged in one indictment. Whether it has happened recently in this country, I will not say; but I am pretty sure that distinct murders have been committed by individuals to that number, and yet there is no example any where of their being tried conjunctly. But the more anomalous and the more serious this case is, it is of the greater importance to public justice, and the interests of the parties, that the utmost caution should be exercised. In doing justice to the public in this matter, it is of the utmost importance to all the lieges of the country,—that this case, which is crimes of the most extraordinary nature, should be proceeded in with the utmost caution which it is in the power of the Court to direct.

Lord Justice Clerk.—Your Lordships have now heard the objection stated by the pannel at the Bar to this indict-

ment, and your Lordships will now give your opinions in consequence of this objection.

Lord Pitmilly.—My Lord Justice Clerk, the Court is peculiarly circumstanced in giving an opinion upon an incidental point in a case, which, in some shape or other, is to go to trial. The counsel for the prisoner have spoken of this incidental point, and they were not called on to avoid saying any thing in favour of the prisoners,—but quite the reverse; and, accordingly, we have heard two very eloquent speeches on the matter in bar of trial,—and, on the other side of the bar, an opposite course has been taken; but the Court, in giving their opinions, must be extremely calm and guarded, so as to avoid doing prejudice to the prisoner, on the one hand, or to the ends of public justice, on the other. I agree with the counsel that there are two very different questions indeed here. The first is, whether the prisoner, Helen M'Dougal, ought to be tried on an indictment which charges three different acts of murder, only one of which she is accused of being concerned in, while the other acts relate to the other prisoner. On that point, I do not think it necessary to say much, from the turn that the case has taken. I have not the smallest doubt that the intentions of the public prosecutor were fair,—that he intended not to prejudice this woman, but to benefit her, by bringing the case fairly to trial; but I entirely approve of his proposal to separate her case from the two acts with which she is not charged. The other question is one of a very different nature,—whether it is competent, in the *first* place; and in the *second* place, if competent, whether it is proper and fit that this pannel, Burke, should go to trial upon an indictment charging him with *three* different acts of murder; or whether they should be separated, and tried separately, at different times. As to the *competency* of the proceeding, it is impossible for me to doubt. When I read this indictment over, I was struck with it; and I proceeded to examine the authorities on the subject; because, although I did not know whether an objection would be taken, it is right the Court should be well informed on such matters. Now, when I look to the very express authorities which have been quoted, I can come to no other conclusion. In the case of Beaumont, there were six acts of housebreaking. In the case of Gillespie, nine acts of forgery were charged. I sat on the Bench, and I entertained not the smallest doubt of the competency of these proceedings. It may not be recollected by counsel; but there is a case which has not escaped my recollection, where two murders (not indeed unconnected) were charged in one indictment. There were two men

killed on the same evening, and the murderer went to trial on that indictment, before me, at Jedburgh. The unhappy man was convicted, and he was executed. I have not the smallest doubt, and I think it would be dangerous if there was a doubt, in any quarter whatever, upon this subject. There may be rules adverse to ours in England on this subject; but our practice has been too well fixed to doubt, for a moment, that one individual may be charged with separate acts of the same sort of crime, committed at different times, and different places, and may go to trial upon such an indictment.

But, my Lords, there remains a question of discretion,—of sound, judicial discretion. If there were a want of competency, it would be *pars judicis* to interfere; but when it is a question of discretion, the Court do not interfere, unless when called upon; for, while they intended to confer a benefit, they might be doing an injury to a person accused. There may be cases where it would be advantageous for the prosecutor to have three trials instead of one,—that is the more common case; because, if the prosecutor fails in the one case, he sees where the evidence fails, and then he comes forward to the next case better prepared. I recollect the case referred to by counsel, where two officers and two sergeants were brought to trial for the murder of different individuals, who were shot on the plainstones of Aberdeen. It was a very long trial, and, at length, the pannels were acquitted. The trial was in the hands of private parties, and they were not satisfied. They immediately notified their intention to bring another indictment against the same persons, accusing them of the murder of a different person. I will never forget the excitement of the feelings of the Bar and the public on that occasion. The whole country was crying out in the strongest manner against such an act of oppression. The prosecutor was obliged to give it up. And such was the sympathy in favour of these people, who were tried under a first, and to be tried under a second and third indictment, that several individuals set on foot a subscription for them; and instead of being punished, they went off enriched. That is the natural consequence of the public prosecutor bringing first one indictment, and then another, and then a third, each for different acts of the same sort of crime. It must lie, therefore, with the Court to judge, in each particular case, after hearing the views of the pannel, on the one hand, and the prosecutor on the other, whether the different charges should be separated. In this case, it is impossible that any such result should happen, as took place in the Aberdeen case; because here the prisoner insists that the different charges should be tried separately; and, therefore, there can be no complaint

against the public prosecutor, if he prosecutes on the second and third charges. And, my Lords, since the prisoner himself states by the mouth of the very respectable counsel, on whose responsibility we take it, that he will suffer a prejudice by going to trial on an indictment which charges three acts of murder, unconnected with each other, I think they should be tried separately, and that the public prosecutor should proceed first with the one, and then with the others, if necessary.

Lord Meadowbank.—My Lord Justice Clerk, I entirely concur in the views which have been taken of this question by my brother Lord Pitmilly, and I am equally satisfied with his Lordship, that it is particularly incumbent on the Court, in a case of this kind, where we are told such excitement has taken place in the public mind, to be particularly cautious to prevent what may fall from us from doing prejudice, either to the one side or to the other, and that even by weighing the expressions we may employ in delivering our judgments. I shall say nothing, therefore, of the circumstances divulged in this indictment, or of the causes for public anxiety, which may be supposed to exist; but I will venture to say this, that there neither is, nor has been, any excitement or prejudice in the minds of any of your Lordships; and the greater, the higher, and the more atrocious the charge to which those individuals are brought to answer, so much the greater, if possible, will be your anxiety to banish the feelings naturally arising from such charges in your own minds, and to see that the individuals accused should suffer no prejudice from the course of procedure that shall be sanctioned by you.

My Lords, the Dean of Faculty said, and I concur with him, that this is a question of general interest, and of great importance. Indeed, if the counsel for the prisoners had persevered in urging that the indictment was incompetently laid, from two parties, and three charges, being included in the same libel, I could hardly imagine a question of greater importance to the course of proceedings in this Court being brought before your Lordships. Such a doctrine, if entertained, would have gone far to shake the whole practice of the Court. The good sense of my friends, the Dean of Faculty, and Mr Robertson, have, however, induced them to abandon the views to this extent, which are stated in the defences for the pannels; and I understand that it is not now contended that the prisoners are not bound to plead to the indictment as it has been laid.

The Dean of Faculty has admitted, that for upwards of 180 years, it has been the practice of this Court proceeding in one steady and uniform course, without interruption,—to admit of indictments containing different charges of the same description of crime, and against different individuals, some of them connected with all the charges, and others of them only with some of the charges; and it is also admitted, that at a remote period, this has taken place in the '*graviora delicta*.'

But we were told that we ought not to look back to precedents occurring in the year 1696, as of authority in this Court. I for one, however, am aware of no reason why we should not recur to that period, any more than to the present. For one, I cannot regard the precedents of that period with the views of the Dean of Faculty, nor consider that they are not just as fit for guiding the judgments of your Lordships, as precedents taken from less remote periods, or in the times in which we are now living. Gentlemen forget that the year 1696 was posterior to the Revolution, when great and eminent lawyers sat upon the Bench,—men as much devoted to the cause of freedom, and who did as much for it as any of their successors; and whose authority, therefore, ought to stand as high in such matters, as that of any of the Judges who have come after them.

In the present case, however, there is no occasion for recurring to those periods for precedents. We have only to look to those cases with which we are every day familiar; and I will venture to say, that none of us have ever sat at Glasgow, without seeing cases in which similar accumulation of prisoners, and offences of a capital description, have not been included in the same indictment.

It is impossible too, to turn up our books, without meeting with cases of this description; and I need only refer your Lordships to the case of Murdieston and Miller, one of the best known cases that ever occurred in this Court, for an example of what I am now stating.

These individuals, your Lordships will recollect, were accused of a great variety of acts of sheep-stealing, and also of reset of theft. The acts of theft libelled, were charged as having occurred at different periods, and during a long track of time. In some of them, both individuals were concerned; others of them not. The places, too, were remote, and in different counties.

The parties were defended by the most eminent counsel,

and many objections were urged to the relevancy of the indictment; but no such objection as that now stated, was then even brought forward. And by as able men as ever sat upon the Bench, the indictment was sustained,—the case went to trial,—the prisoners were convicted, had sentence of death; and notwithstanding the most urgent representations to the Crown, and an attempt even at appeal to the House of Lords, (I believe,) in which nothing of this kind was urged, the sentence was carried into execution.

In our own times, again, it is admitted, (and after the statement read from Mr Baron Hume, it was impossible to controvert the fact,) that in cases of forgery, (a crime inferring a capital punishment as much as the crime of murder,) this multiplication of charges has been repeatedly admitted. In fact, I remember, in one case, at Glasgow, of uttering forged notes, in which both a father and daughter were accused, which was tried before myself, assisted by Lord Gillies, where there were three or four charges, I forget which, of uttering forged notes, to different individuals, and at different times; the father being accessary to the whole, the daughter only to one of the charges, the Court had no doubt of the relevancy of the indictment. The father was convicted and executed; and with respect to the daughter, the libel being restricted, she had setence of transportation.

In cases of theft, the instances are innumerable; but as this is not disputed, I shall say nothing of those cases, farther than to advert to the reason which has been alleged for this accumulation being admissible in that class of capital offences, while it is not in others,—viz. that habit and repute, or the reiteration of the offence, is in itself a ground for conviction, or rather for exciting a legal ground of suspicion against the person accused.

But, in the *first* place, in theft, no more than in any other crime, can habit and repute, or a reiteration of the offence, be used as an ingredient in the evidence adduced for convicting an individual of any one particular act. Each act must stand by itself; and the habit and repute, or reiteration of the crime, can only go as matter of consideration to the Court in apportioning the sentence.

But I observe, that in the passage quoted from Baron Hume, there was a case mentioned by him which had nothing to do with habit and repute—I mean the crime of robbery, in which he maintains, and we know from every day's practice, that it *is* competent to charge repeated acts. But in the crime of robbery, habit and repute has no more to do than in the crime of murder. Considering robbery as an aggravated theft,

I was once inclined to be of opinion, that being habit and repute a thief, might be laid as an aggravation; and I directed an indictment to be so laid, when holding the high office so honourably discharged by my Right Honourable Friend at the Bar, in order to have the point settled. But your Lordships held that such a charge was incompetent; and it is now therefore fixed law, that a charge cannot be so laid. In this respect, therefore, the crimes of robbery and murder are in the same situation,—both are of the same class, and among the *graviora delicta;* and it is no more competent to charge one with being habit and repute a robber, than with being habit and repute a murderer: Both, in this respect, are alike. I can see no principle, therefore, on which it should be held competent to accumulate charges of the one description in the same indictment, and not in the other. If we have done right in entertaining such libels in the case of robbery, I can see no ground for rejecting charges similarly made in the case of murder.

But the case is now offered to our consideration, not as one of incompetency, but as one of discretion, in which the Court is to determine whether it is fitting that the trial should proceed at one and the same time, of the three charges, as laid in the indictment,—your Lordships having a due regard to the ends of justice, and the interest of the prisoners.

This is a very different question, and one requiring a different consideration.

In the *first* place, however, I must remark, that I think the Lord Advocate acted with sound discretion, in laying the indictment as he has done, both for the sake of the public, and because, by so doing, he has given the prisoners every advantage in his power to confer on them,—which, if he had raised separate libels, they would have lost. By adopting this form, his Lordship has left it to the prisoners and their advisers, to consider if it was for their benefit to go to trial together;—or, if they thought otherwise, to apply to your Lordship to separate their cases. In like manner, with respect to the other prisoner, Burke, if he deemed it proper to go on with the three charges, he might do so; and if not, he might apply to your Lordship to separate them. In so doing, the public prosecutor was entitled to think, nay, was bound to think, that he left the prisoners with the best protection which he could afford them. He left them in the hands of your Lordship, to whom, and to whose discretion, no appeal could be made in vain. I can have no doubt, therefore, of the propriety of the mode in which these prisoners have been charged.

But we have now nothing to do with the case of the prisoner M'Dougal, as the Lord Advocate consents that her case should be tried separately. As to Burke, the most eminent counsel at the Bar have stated their reasons for thinking, that it is for the benefit of the prisoner that the trial of the three charges should be separated, and their reasons for so judging. In this case, I am for yielding to this application. Perhaps I do not enter entirely into the views which they have stated, as affording the grounds of their advice. But with the counsel, and not with us, rests the responsibility of so having advised their clients; and as I consider that the ends of public justice will be equally attained by trying the offences separately, I am of opinion, that while your Lordships sustain the indictment, you shall direct the Lord Advocate to proceed separately in the trial of the different charges.

Lord Mackenzie.—I have nothing to add to what has been stated. This indictment, in the major proposition, contains one charge of murder; and, in the minor, three separate instances of that crime. In these circumstances, I think that there is nothing in the form of this indictment objectionable. If this case had gone on to the full extent, without objection, I do not see that there would have been any thing illegal. But I also think, that in indictments of this form, the Court has a discretionary power, on its being stated by the pannel and his counsel, that he will suffer prejudice in the trial, if a plurality of charges are proceeded in at once—I say the Court has a discretionary power of separating these charges, provided the Court are satisfied that the request made is fair, and not unreasonable. Now, in this case, I am of opinion that we cannot say the request, stated in the way it was stated, and supported with the reasoning with which it was supported, is either unfair or unreasonable. I therefore think the proposal that has been made by Lord Pitmilly ought to be adopted.

Lord Justice Clerk.—In reference to the argument that we have heard so ably stated on both sides of the Bar, I shall, as your Lordships have done, confine myself to the competency of the indictment against the pannel Burke. The other point which has been objected to, has been withdrawn from our consideration by the Lord Advocate—in the propriety of which course I entirely concur. As to the objection taken to the competency and legality of this indictment—after listening to every thing that has been urged—after considering the authorities, and recollecting, likewise, something of the practice of your Lordships since I sat here, I certainly thought, with all of your

Lordships, that this indictment was framed in a legal and competent form. The pannel is not charged with crimes of a different nature, in the same indictment. He is charged with one single crime—that of murder; but he is accused of having committed three different acts of that crime; no doubt one of them in April, another in October, the third on the last day of October, or the beginning of November; and certainly, I admit distinctly, in different places, but all within the city of Edinburgh, or its liberties. He, therefore, does not in the least degree stand in the situation of a party, as has been pressed on your attention, loaded with a variety of crimes. I have known cases, where an individual had a variety of different crimes charged against him, and where the Court had been called on to interfere. In the case referred to by Mr Hume, (page 168,) there were many crimes charged in the indictment, whereby the pannel might have been embarrassed in his defences, or suffered hardship;—in these cases, the Court have the power to divide, or parcel out, the libel, and proceed to the trial of as many of the articles as they can dispatch at a single diet; reserving the others to another diet. The learned author observes: 'This course was followed in the trial of David Young, whose 'indictment was for fire-raising, cursing of parents, attempt to 'murder, assault, and deforcement of the officers of justice; and 'these crimes charged as committed against different persons, 'in the years 1733 and 1738, and the intervening years. In 'the information on his part, he insisted on the troublesome and 'oppressive length of such a trial, and the difficulty he must find 'of conducting his defence against charges so numerous, and 'so remote from each other, both as to their kind, and the pains 'of law. The Court proceeded, therefore, in the first diet, to 'the trial of the two capital charges, the fire-raising, and cursing of parents; and delayed to give judgment on the other 'less important articles of the dittay.'—*(Vol. II. p.* 168.*)*

Here is an illustration of what the practice was in those days; and the course that the Court took there was, to separate the different articles charged, and try them at different times: But this authority cannot apply to the present case, which is a charge of murder, and murder alone, by committing three different acts of that crime. It has been the practice of this Court—and, if contrary to law, we have all been very ignorant in the proper discharge of our duty—to give effect to indictments, charging a variety of acts of housebreaking, and highway robbery, &c.,—sending such indictments to a Jury,—receiving verdicts, and carrying the law into execution. I recollected a case (1817), where a person was charged in this

Court with a variety of acts of robbery on the highway, and having sent for my note-book, I observe that the verdict returned by the Jury is,—'Find the pannel (Worthington) guilty of the 'three first charges of robbery contained in the indictment.' Robbery is one of the four pleas of the Crown; and on what principle of law we can make the distinction between it and that which is just another of these pleas, it is impossible to conceive. Therefore, I think that the charge here stated is a competent and legal one; and it is not in the power of the Court, without departing from all the authorities and decisions, to find that it is incompetent and illegal.

But, besides the legal objection to which I have just adverted, the Dean of Faculty has put the case, as one to be dealt with according to the discretion of the Court. He states, that upon the most due consideration of the charges brought against the pannel, and the circumstances in which he stands, the pannel ought not to be sent to trial upon the indictment as it is framed; and he asks your Lordships to separate those charges before trial. I am, therefore, necessarily called upon to look to the principles that have influenced the Court, in all cases where there was an appeal to its discretion; and, taking them fully into consideration, I come to be of opinion, that the present may be held as belonging to that class of cases where the Court have held that an indictment is relevant, but have found it inexpedient that the pannel should be sent to trial upon it. That is just the principle which must influence me on the present occasion, as well as your Lordships. When, upon the responsibility of respectable counsel, the pannel says that he will be prejudiced in going to trial on all the charges, I am inclined to grant the request now made. But we do it on the principle, that the pannel has three specific charges exhibited against him in this indictment; and the public prosecutor will have his choice of the one he is to proceed with. He may proceed *seriatim* on the other acts that are not this day to be tried, and the deliverance of the Court on this indictment must be—in respect that the pannel, William Burke, is properly and legally brought into Court, the public prosecutor shall select which of the three he wishes to proceed with. I may just add, that if the case had gone to trial upon the three charges of murder, it would have been the sacred duty of the Judge in charging the Jury, to have told them that they were trying three separate and distinct acts, though of one species of crime, and that they must apply the evidence to each of these three acts; and I am sure the Jury would have been equally on their guard against any impression of a different sort.

LORD ADVOCATE.—According to the judgment of the Court upon these objections, I am tied down to proceed with the trial of one of those crimes, leaving me the choice as to which shall be first taken, and reserving my right, in case I shall fail in one, to proceed to the trial of the others. I propose, therefore, to proceed with the third case libelled, and, on this footing, there seems nothing to prevent my proceeding against the woman as well as against the man. She can suffer no prejudice in now being brought to trial for this single act, on which she is charged as art and part guilty along with Burke.

DEAN OF FACULTY.—I thought the Lord Advocate had deserted the diet *pro loco et tempore* against the woman.

LORD ADVOCATE.—If this libel had gone to trial against Burke on these three charges, I was inclined to desert the diet against the female prisoner; but now that I am to be restricted to the trial of one of these charges, I am entitled to try her and him together on the last of the charges exhibited.

DEAN OF FACULTY.—But, still, the other two charges stand upon the indictment.

LORD JUSTICE-CLERK.—There is nothing in that. Have you any thing more to state on the part of the prisoners?

MR ROBERTSON.—Oh no, my Lord.

The following interlocutor, repelling the objections, was then pronounced:—

INTERLOCUTOR OF RELEVANCY.

The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the indictment against William Burke and Helen M'Dougal, pannels, and having heard parties' procurators at great length upon the relevancy thereof,—Find the indictment relevant to infer the pains of law; but are of opinion, that in the circumstances of this case, and in consequence of the motion of the pannels' counsel, the charges ought to be separately proceeded in; and that the Lord Advocate is entitled to select which charge shall be first brought to trial; and His Majesty's Advocate having thereupon stated that he means to proceed at present with the third charge in the indictment against both pannels—therefore remit the pannels with that charge, as found relevant, to the knowledge of an assize, and allow the pannels, and each of them, a

proof in exculpation and alleviation, reserving to the public prosecutor afterwards to proceed under this indictment against the said William Burke upon the other two charges contained therein.

(Signed) D. BOYLE, *I. P. D.*

LORD JUSTICE-CLERK.—William Burke and Helen M'Dougal, the indictment having been read in presence of you both, I again ask you, William Burke, are you guilty or not guilty of the third charge contained in this indictment?

WILLIAM BURKE.—Not guilty.

LORD JUSTICE-CLERK.—Helen M'Dougal, are you guilty or not guilty of that charge?

HELEN M'DOUGAL.—Not guilty.

The following Jurymen were then selected by ballot by the Clerk of Court, and sworn to pass on the assize of the pannels:

Nicol Allan, Manager of Hercules Insurance Company, Edinburgh.
John Paton, builder there.
James Trench, builder there.
Peter M'Gregor, merchant there.
William Bonar, banker there.
James Banks, agent, Cassillis Place, Leith Walk.
James Melliss, merchant, Edinburgh.
John M'Fie, merchant, Leith.
Thomas Barker, brewer there.
Henry Fenwick, grocer, Dunbar.
David Brash, grocer, Leith.
David Hunter, ironmonger, Edinburgh.
Robert Jeffrey, engraver there.
William Bell, grocer, Dunbar.
William Robertson, cooper, Edinburgh.

EVIDENCE FOR THE CROWN.

The following witnesses were then adduced on the part of the prosecutor:

JAMES BRAIDWOOD, *sworn by the* LORD JUSTICE-CLERK.

Interrogated by Mr ALISON—(*A plan of Wester Portsburgh was handed to the witness.*) Was that plan made by you? Yes, sir.

What is it the plan of? The houses of Wester Portsburgh, and the places adjacent.

Who was with you? There was an officer. I was there on the Saturday night; I went with Mr Stewart.

Did you know it to be Burke's house? Yes, I knew it to be Burke's house.

Is the plan in your hands a correct delineation of the houses under ground there? It is.

MARY STEWART, *sworn by* LORD PITMILLY.

Interrogated by Mr WOOD.—Do you remember a person of the name of Campbell coming to your house last harvest? Yes, sir, Michael Campbell.

Do you remember what month it was in? No, sir, I do not recollect.

Some time before Martinmas last? Yes, before Martinmas.

Lord JUSTICE CLERK.—You are sure it was before Martinmas? Yes.

Mr WOOD.—Did he remain in your house some time? I think about two months.

You cannot speak precisely? No.

And then he left the house? Yes; he left it on the Monday before the fast day, 30th day of October.

Did any woman after that come to your house inquiring for him? Yes, sir, I was told so; I was lying in the infirmary at the time.

On your return from the infirmary, did you find any person in your house at that time? Yes, sir, I did; a woman, that he said was his mother.

Did she state for what purpose she came?—in search of her son? Yes, sir.

What name did she give herself? She gave herself Mrs Campbell, Madgy, or Duffie. I have forgot,—her husband's name was Duffie.

Did she say where she came from? From Glasgow.

How long did she stay in your house? Just till the next morning.

What day was it you came from the infirmary? I came out on the fast night, and she left me on the Friday morning.

She left your house on the 31st October, on the Friday morning? Yes.

LORD JUSTICE CLERK.—You recollect of her leaving it? Yes, sir.

Do you recollect where she said she was going?—Was she going to search for her son,—see after her son? Yes, sir.

Mr WOOD.—Her son was not in your house at that time? No, sir.

He had gone? Yes, sir.

You know a person of the name of Charles M'Lauchlan? Yes.

You have seen him to-day? He is along with me at present.

He stopped with you? Yes; he slept with my son and Campbell.

Did the woman go away in company with Charles M'Lauchlan? She went out of the room in company with him, so far as I saw.

Have you ever seen that woman since? No, not till I saw her in the police-office.

I would ask you what hour of the day on Friday was it that she left your house? I never rose that day; as I thought, it was 7 or 8, but I have been informed it was farther in the day.

Do you remember what day you saw this woman in the police-office? On the Sunday.

Was she alive or dead? She was dead.

Lord Justice-Clerk.—That was two days after? Yes, sir.

Mr. Wood.—Had you no difficulty in recognising the body to be the body of the woman Campbell that lodged in your house? No, sir, I had no difficulty.

Have you any recollection what dress that woman wore when she left your house? A petticoat, a red short-gown, striped, a long printed gown, short-sleeved and open before, and sewed with white cotton thread behind.

I suppose you would know these articles again? *(The articles were handed to the witness, which she identified.)*

Lord Justice-Clerk.—These are the articles which she had on when she left your house? Yes, she had these articles, but I know nothing else.

What age did this woman appear to be? Between forty and fifty, I suspect.

That is to say, you suppose? Yes.

Mr. Wood.—About what size was she? A little low-set woman about my height (about five feet).

Lord Justice-Clerk.—When she left your house, did she appear to be in good health, so far as you know? Yes, sir, in as good health as any woman could be, to all appearance.

Lord Meadowbank.—Pray, during the time she was in your house, did you see her drunk at all? No, sir, never the worse of liquor.

CHARLES M'LAUCHLAN, *sworn by* Lord Pitmilly.

Examined by Mr. Wood.—In the month of October last, did you reside in the house of Mrs. Stewart in the Pleasance? Yes, sir.

You saw her here to-day? Yes, sir.

Did you see Michael Campbell there? Yes, sir.

He left it, when? About the end of October, the 30th.

Do you recollect a woman coming to him about the end of October? Yes.

When she came, was Michael Campbell living in the house or not? Yes, sir, he was.

Was Mrs. Stewart in the house at that time? She was in the infirmary.

What name did she go by, this woman? Marjory M'Gonegal.

What other name had she? Mrs. Campbell or Duffie. She was married a second time; Duffie was her second husband.

She was called Campbell, Duffie, or M'Gonegal? Yes.

Had you ever seen her before she came to that house? Yes, sir.

Where did she come from? From Inishowen in the county of Donnegal, in Ireland.

Did she remain some days at Stewart's? Yes, sir.

What day was it she went away from Stewart's the last time? On a Friday, 31st October.

At what hour? Betwixt the hours of nine and ten in the morning.

Did you accompany her? No, sir, she came to me at my own shop door.

Where is that? At the foot of St. Mary's Wynd.

Did she tell you where she was going, or what she was to be about? I asked her where she was going, and she said she did not know where her son was, and she was leaving town.

Was she in perfect good health at the time you saw her? Yes, in perfect good health, and had been so all the time she was in Stewart's.

Did she appear to be of sober habits all the time you knew her, or otherwise? She was.

Then do you know whether she had any money? No, I do not think she had any money.

Did she complain of not having any? I did not hear her, say so.

Lord Justice-Clerk.—Had you access to know whether she begged or not? I cannot say whether or not.

Do you know whether she paid any thing for her lodgings at Stewart's? Her son paid for her.

Had she breakfasted in Stewart's that morning before leaving it? No, sir, she had not.

Did you ever see her again? Not in life, sir.

Pray, did you see her body after? I did, sir.

Where? In the police-office.

When? On the 2d of November.

Next Sunday? Yes.

Two days after? Yes.

Lord Advocate.—Did you know the body? Yes.

Mr. Wood.—you saw the body, and knew it to be the body of the woman Campbell? I did, sir.

Did she ever call herself Docherty? Not that I know of.

WILLIAM NOBLE, *sworn by* Lord Meadowbank.

Interrogated by Mr. Alison.—Mr. Noble, you are a shop-boy in the employment of Mr. Rymer? Yes, sir.

Where? 107, Portsburgh.

Do you know the prisoner Burke by sight? Yes, sir.

You have seen him come about your shop? Yes, sir.

Do you know a man of the name of Hare? Yes.

There is a man of the name of Hare also comes about the shop? Yes.

What do you sell in your shop? Groceries.

Do you recollect an occurrence happening in the West Port of a body being found that made a great deal of noise some time ago? Yes.

One morning before that, do you recollect Burke being in your shop? Yes; and I recollect a woman came in asking charity; it was on the 31st October.

Lord Advocate.—Friday of the preaching week? Yes.

About what o'clock? About nine o'clock.

Was Burke in the shop at the time? He was.

Well, sir, tell us what passed between Burke and the woman—What like a woman was she? A little woman.

What age might she be? I cannot say.

Was she a girl of 15 or 19? She was a middle-aged woman.

Do you remember how she was dressed? No.

Was she dressed like a beggar? I could not say.

Did she ask charity from Burke? No.

What passed between Burke and her? He asked her name, and he said she was some relation of his mother's.

Lord Justice-Clerk.—Was it that she was a relation, or might be some relation? That she was some relation of his mother's.

Did Burke say what his mother's name was? No.

Did Burke and the woman seem to be acquainted when they first met, and do you recollect who spoke first? I don't recollect.

Lord Advocate.—Do you recollect if they seemed to have been acquainted? I don't recollect.

Well, sir, what happened? He took her away with him.

Did he say any thing; and what did he say? He said he would give her her breakfast.

Lord Justice-Clerk.—And they went away together? Yes, sir.

Mr. Alison.—This was on the Friday morning? Yes, sir.

When did you next see Burke? I saw him that forenoon.

What did he do then? He got some things.

Bought some groceries? Yes.

Did he come back on the following day and get any thing away? Yes; he came back on the Saturday, and bought a box.

Lord ADVOCATE.—At what time of day? Between 5 and 6.

In the evening? Yes.

What kind of a box was this? An old tea-box.

Look at that box there; *(witness was shewn an old tea-box)* see if it was a box like that. I could not say.

Lord MEADOWBANK.—Was it the same size? Yes.

Lord ADVOCATE.—The same kind of box? Yes.

Lord JUSTICE-CLERK.—Have your tea-boxes any particular mark of Mr. Rymer's upon them? No, sir.

Did Burke pay for the box at the time or afterwards? No, sir; it is not paid yet.

Did he take it away? No; Mrs. Laird or Hare took it away.

Did he say he would take it away? No; he said he would send Mrs. Hare.

Lord JUSTICE-CLERK.—He said that at the time he bought it? Yes.

Mr. ALISON.—Well, sir, did Mrs. Hare come for it? Yes.

Mrs. ANN BLACK or CONWAY, *sworn by* LORD MEADOWBANK.

Interrogated by Mr. WOOD.—Do you live in Wester Portsburgh? Yes, sir.

What does your house consist of, one room or more? One room.

Not far from William Burke's, you go down a stair, don't you? Yes, sir.

In getting in at the foot of the stair there is a passage, is there not? Yes, sir.

As you go in that passage, is your house on the right or the left? On the right.

Is the door of your house the first door that meets you going in? Yes, sir.

On going on, is there another door on the same side of the passage? Yes, sir.

Another door a little farther in? Yes, sir.

Does that door lead directly into a room, or into a passage first? It leads into a passage first.

Into another passage? Yes.

The house next yours is farther into the end of that passage? There is a room, and a door for the room.

So there is a door for the inner passage, and there is a door at the end of that passage into a room? Yes, sir.

The room is inclosed by two doors—Now, who lived in that

room in the month of October last, about the end of it? The last person that lived in it was Burke.

Look at the prisoner at the bar; is that the person? Yes, that is the man that occupied it the last week of October.

Look at the other person at the bar; did you ever see her before? Yes.

Did she live with Burke? Yes.

M'Dougal is her name? Yes.

On the other side of the first passage, is there any house? Yes, there is one.

On your left as you go in? Yes; and there are cellars, but no person inhabits them.

Who lives there? Mrs. Law.

Lord Justice-Clerk.—That is nearly opposite to your house? Yes, sir.

Did you ever see a person of the name of Hare coming about Burke's house? Yes, sir.

You know him and his wife? Yes, sir.

Do you know whether there was any lodger lived with Burke in the last week of October? Yes, there was a man of the name of Gray and his wife.

Did you, on the 31st October, see Burke at all? Yes. That was hallowe'en night? Yes.

What time of the day? I don't recollect the time of the day.

Did you see him in the early part of the day? Yes.

Any body with him? There was a woman along with him.

Try and recollect the time of the day? I fancy it might be between one and two o'clock. I just saw him passing by me as I was sitting by the fire. The door of the room being open, I saw him passing by, with a woman immediately behind him.

Were they going in or out? They were going into Burke's.

Was she a stranger to you, the woman? Yes, I never saw her till that time.

Was there any body in your house along with you at that time? Yes, sir, Mrs. Law.

The person living on the opposite side of the passage? Yes, sir.

Did you go into Burke's house that day? Yes, sir, about this time of night, about three o'clock.

Was there any body with him? Nobody.

Was there nobody? This woman was sitting at the fire.

Anybody else? I do not recollect, sir; I did not sit down.

Was she occupied in any thing? Supping porridge and milk.

How was she dressed? She had a short-gown, and a napkin tied round her head. They said they were washing at the time for her.

And you cannot say she had more then on her? No.

Did you see her shift when drying at the fire? No, I do not remember seeing it.

And you say there was nobody in the house at that time? No, I do not recollect; at that time I never expected it to be called in question.

Burke was there, and M'Dougal? Yes.

Did you say any thing to her? I said, you have got a stranger; and she said it was a highland woman, a friend of her husband's.

You said, you have got a stranger; and she said, they had got a friend of her husband's, a highland woman? Yes.

Had you any more conversation? Not at that time.

Then you left her, and went back to your own house? Yes, sir.

Did the stranger woman appear to be sober at that time? As she did not say any thing, I could not say.

You saw nothing to lead you to think she was not so? Nothing, at that time.

Tell us what happened after you went into your own house? After I went into my own house, and sometime after the darkening, Burke's wife came into me, and asked me to pay particular attention to her door, lest anybody should go in, until she came back. My husband was sitting at the fire, and he said he thought there was some person going into Burke's house.

This was some time after Mrs. Burke went out? Yes.

Now, did you do any thing in consequence of what your husband said? Yes, sir, I took a light, and went in, and there was nobody there but the stranger.

And you found nobody there but the stranger? None, that I could see.

Now, what did you do? I said to her that I thought there was some person going into the house, and I came to see who it was. She rose and came out after me. She was something the worse of drink.

Did she say any thing to you when you was going along the passage? She said she was going to St. Mary's Wynd to see a person that had promised to fetch her word about her son, that she had promised to meet there.

Any thing more? She wanted the name of the land of houses to return back, as she had no money to pay for her bed.

That was the name of the land of your houses? Yes.

Did she go away then? I told her she must not go, as there were three lands, all belonging to one landlord, and she would not find her way back.

Lord Advocate.—What did she say then? She said that that man had promised her a bed and her supper.

What did she call him? Docherty.

That was Burke? Yes.

Did you say any thing more to her? I said the police would take her up, as she was the worse of drink, if she went along the streets, and she then went into our house.

Was there any conversation that passed betwixt you and her? My husband having been in the army, asked her what part of Ireland she was from, and she told him; and he recollected a good many of the people about the place,—my husband having been there when in the army.

Lord Justice-Clerk.—They spoke about Ireland? Yes.

Did she say any thing about going to Burke's? She said that she was going there, as he had promised to give her a bed and supper; and she said that she intended to stop with them for a fortnight.

Lord Advocate.—Did she say so? Yes.

Tell us how she explained his name? Docherty. I told her that his name was Burke, and she would not allow me to say so; she said it was Docherty.

Did she say why she thought so? She said that that was the name he had given himself to her.

Mr Wood.—How long did she remain in your house? An hour and a half.

What name did she give herself? Docherty. And that her own name was Campbell, by her husband.

Did any body come into your house before she left it? Yes Sir; Hare and his wife, and Mrs M'Dougal.

Now, what was done after they came in? Hare's wife had a bottle under her apron, and insisted that we should have a dram. Burke's wife came in after.

Then there was nobody but Hare and his wife, and Burke's came in after? Yes.

Did you drink? Yes; and they gave some to my husband.

Did M'Dougal come in before the spirits were touched? Yes.

Did she drink? I fancy she took a share too; but I cannot say how much.

Lord Justice-Clerk.—Did the stranger woman and MacDougal partake of it? Yes.

You do not know whether she took any? I dare say she did drink, but I cannot say.

Lord Advocate.—Were they merry? Yes. Hare was dancing, and Mrs M'Dougal, and this woman.

Was she quite well? Only her feet. She hurt them in dancing.

Except her feet she was quite well, and they were quite well

too, except in the dancing that she got them hurt? O yes, quite well otherwise.

Did they all leave your house together? No Sir, they did not.

Who went away first? I do not know; but I know Mrs Campbell was a long time in with me.

And she would not go out of your house till Docherty came in? Yes.

Did you see him then? I had not seen him that night.

Lord Justice-Clerk.—He had been out for sometime? Yes. It was getting late, and I wanted her to go into her own house. She bade me not be cruel to strangers.

And you allowed her to remain? My husband had to go out at half past four in the morning, and I had to rise to make his porridge. I was anxious to get her away, but she would not go till she saw Burke go into his own house. Burke came in then, and I said there is Docherty now.

Lord Advocate.—He was passing towards his own house? Yes.

Mr Wood.—At what time? I dare say between 10 and 11.

Did you go to the door to see where she went? She went that way, (as into Burke's house), and I locked the door and went to bed.

Now, did you sleep sound in the morning? No, I did not.

What prevented you? A disturbance in Burke's house.

When did it begin,—shortly after they had all gathered together? Yes.

At no long distance? I could not exactly say, but it was not long.

What kind of a disturbance was it? They were fighting like.

Did you go out? No. The moment the woman went out, I locked the door and went to my bed.

When did you get up again? I fancy between three and four. I set the fire on, and went to bed.

When did you get up in the morning again? About eight.

Had your husband gone to work at the first time? Yes; about half past four.

Who did you hear first? I heard Hare's voice in the passage, calling to Mrs Law in my house at that time.

She had come in then? Yes.

Did she go to him? No. She did not answer.

Did any other person come to your door? None at that time.

Was there any other person came at that time? Yes; a girl came inquiring after Burke at that time.

What was her name? Paterson.

Is she among the witnesses to-day? I believe so. She came asking for John, (meaning Burke.)

What time might that be? Between eight and nine. She asked for John, and she asked for Burke.

Did you direct her to Burke's? Yes, Sir.

Now, did you see M'Dougal shortly after that? Yes. She told me that William was wanting me;—it was a little past nine.

Who did you understand was seeking you? William Burke.

Did you go *ben* to Burke's? Yes.

Now, who did you find in Burke's then? Mrs Law, Mrs M'Dougal, and young Brogan.

What were they doing? Burke had a bottle of spirits in his hand.

Was he drinking the spirits? Yes; and he filled a glass to me, and I drank it.

Well, tell us what more he did? He took the bottle with the spirits, and threw the spirits up from where he was sitting, towards the roof of the house.

There was a bed in the house? Yes.

Did he throw any spirits about the bed? His back was to the bed, and then he threw the spirits upwards.

Did he say any thing on doing this? He said he wanted it done, to get more spirits.

Did you make any inquiry about Campbell? Yes. I asked M'Dougal what had become of the old woman, and she said Burke and her had been *ow'r friendly* together, and she had turned her out of doors: That she had kicked her out of the house.

Did she say to you what time that happened? No, Sir; she made no remark, and I did not like to say any thing about it. She asked me if I had heard it, and I said no.

Lord Advocate.—Was Burke present? Yes, Sir.

Well, did you say thing on that to him? No, Sir.

Do you recollect him saying any thing about the woman at that time? Yes, Sir. He asked if I had heard about the dispute.

Did he give you to know what it was? He said it was just a fit of *drink like*, but she was quiet enough now.

How long might that dispute last? I could not say.

Now, at the time that you got up between three and four o'clock to make your husband's breakfast, were they quiet then? Yes, they were all like sleeping.

And some time before that? Yes.

Did you hear any noise at that time? No.

Did Burke's wife sing a song when you was in the house? Yes.

Did you see any straw lying near the bed? Yes, Sir.

Was there a quantity of straw lying at the one end of the bed? Yes, Sir.

Did you see any spirits thrown under the bed, or amongst the straw? Yes, Sir. I saw him throw none but the time that I spoke of.

What time of day did you leave the house? It might be after ten o'clock.

When did you return to Burke's again? In the afternoon.

When was that? Saturday.

Did Burke's wife ask you? No; but Mrs Gray, Burke's lodger's wife, did. I met her in Burke's—Burke and M'Dougal's.

Then you went out again? Yes.

Did Gray's wife come to you again on the Saturday night? Gray's wife had previously told me that a dead body had been found in Burke's house, and she came in near about eight o'clock, to take me in to see the body; but when I went into Burke's house, I was so frightened that I turned and came out. All that I can say is, that I went in, but was so frightened that I went out again.

(Witness spoke so low, that she was inaudible to the Jury.)

Lord Justice-Clerk, *(then read his notes to the Jury.)* 'At 'a later hour, about eight, Gray's wife had been telling her 'about the body, and she went to Burke's house to see what 'she had told her of. She saw nothing but the straw, and 'was so frightened, that she went away without seeing any 'thing.'

Lord Justice-Clerk, *(to the witness.)* Is that it? Yes.

Mr Wood.—Now, after that, did you see the prisoner M'Dougal? Before I heard any thing of that, and before Mrs Gray took me into the house, M'Dougal came to me, and said that that woman had been stealing things out of her house.

What woman? Mrs Gray. And she insisted that I should pay attention to the door till she would come in again, as it did not lock.

This was on the Saturday evening; about what time on Saturday was that? I fancy it might be about six o'clock.

What happened after that? When I was making my husband's supper, Hare came to the door.

Was this on the Saturday night? Yes, on the Saturday night.

Now, what did he do? He was going into Burke's; and I cried to him, there is no one there; and he came into our house.

Did he afterwards go to Burke's? No; he went out.

Then M'Dougal came? Yes; and I cried after her, had she got the woman Gray.

Did you afterwards go to Burke's door. Yes.

Did you find it open? No, it was fastened.

That was the inner door? Yes.

Did you see any body, after that, come out of Burke's house? No; I just turned into my own house.

After you had gone to Burke's door, and found it fastened, did you see any body after that come out? Yes, Hare came in to our house.

Did you see M'Dougal? Not at that moment.

When did you see her? After that again.

Did you see M'Dougal before Gray? Yes. I went into the street; and when I returned, I found M'Dougal standing in my house.

Nothing passed? Nothing.

Then Gray came in, and you went into Burke's house; came out again, and went into your own house; and saw nothing? No, Sir.

Did you see Burke after that? I did not see him till a good bit on in the night.

Now, had you any conversation with him then? Yes; after 8 o'clock, I spoke to him about the noise they had been making the previous night;—my husband told Burke that there was a noise abroad, that it was reported he had murdered the woman; he laughed, and said he did not regard what all Scotland said about him.

Lord Meadowbank.—Do you say he laughed very loud? Yes; and Mrs Burke laughed very loud; and he said that he defied all Scotland to say any thing against him.

Did M'Dougal say any thing? She said that all the world could not say any thing against him.

At that time, did you see any policemen? Burke said he was going to see the man that said it; and the policeman gripped him on the stair when he was going out.

Cross-examined by the Dean *of* Faculty.—Before he went into the passage, where he met the policemen, he went out, when he met the man Gray;—he was going to seek the man that said it, and that was Gray; and he met him along with the policemen;—did you hear what passed between him and the policemen? No.

Did the policemen take him into his own house? Yes.

Lord Justice-Clerk.—When he said he was going to see the man who said it, did he refer to Gray? Yes; my husband told him that Gray said he had seen a corpse in Burke's house; that he was going to get the policemen for him; and Burke said he would go and see if he could find him.

Interrogated by a Juryman.—When you went into the

house, what was the cause of your alarm there? Hearing tell of a murder frightened me.

I suppose we are to understand that that referred to the conversation that Gray had with you, and nothing else? Yes; and nothing else.

JANET LAWRIE, or LAW.—*Sworn by* LORD MACKENZIE.

Interrogated by MR DUNDAS.—Now, Mrs Lawrie, you live in a house in the same passage with the prisoners; did you live there in the month of October last? Yes; in the same passage with John Connoway, his wife, and Burke and his wife.

Do you recollect on the 31st October last being in Connoway's house? Yes, Sir. I recollect on the 31st October last being in Connoway's house.

At what time of the day was it? About one o'clock in the afternoon.

Do you recollect at that time of seeing the prisoner, Burke, in the passage? Yes, Sir.

Was he alone, or was there any person with him? There was a little woman following him.

Now, where did they go to, (Burke and the woman)? They went into Burke's house.

Did you observe a man called Hare, and his wife, in that passage, or that land, that evening? Yes, Sir.

Did they go into Burke's house? Yes, Sir; I saw them in Burke's house.

About what time in the afternoon might it be that you saw them there? About six or seven.

Was the little woman there likewise? Yes, Sir.

At that time were they merry, dancing and drinking? Yes, Sir.

Did you get any spirits? Yes, Sir.

You were not long in Burke's house at that time? No, Sir, about twenty minutes.

What time did you go to bed, do you recollect, that night? About half past nine.

At the time that you went to bed, did you hear any noise of dancing or singing? No, Sir.

In the night did you hear any noise or merriment? Yes, Sir, after that.

Was it long after you went to bed? Some time.

Did you hear singing and dancing, or was it scuffling or fighting? Yes, scuffling or fighting.

Did you hear any dissension previous to the fighting? No.

In the course of the night you say you heard scuffling? Yes.

Was there a great noise that followed? Yes, there was.

Could you distinguish any persons' voices in the scuffling? I was not sensible of any person's voice but Burke's.

Did this noise last long? It lasted for some time.

And you fell asleep at last? Yes, Sir.

Now, the next morning, did any person come into your house? Yes, Mrs Burke.

For what purpose? The loan of my bellows.

Did she say any thing? She asked me if I had heard Burke and Hare fighting *through* the night time.

Now, do you recollect any thing more about the fighting? I asked her what she had done with the little woman.

Now, give us the words that she used? That 'she kicked 'the d——d b——h's backside out of the door.'

Did she say why she had turned her to the door? Yes; That she had been using too much freedom with William.

Meaning Burke? Yes.

Now, she went away after this? Yes.

Did you see her again when she came back to your house in the morning? Yes; about nine o'clock.

At what time was this first conversation? About eight o'clock.

And when she came back at nine, she borrowed a dram glass from you, I believe? Yes, Sir.

Well, did she ask you at that time to come into her house? Yes, Sir.

Did you go in? Yes.

Who did you find there? Hare was there, and Burke was there.

Was Mrs Hare there. I am not sure. I do not recollect.

Was there a man called Brogan there? Yes.

Was Gray and his wife there? Not at the time I went in; but they came before I left it.

Was M'Dougal there? Yes, Sir.

Did Gray and his wife come in before you left the house? Yes, Sir.

Are you *sure* that both Gray and his wife came in? Yes, Sir.

Now, did you remark any thing particular that Burke did when you were there? Yes, he took a bottle and some spirits, and sprinkled the spirits on the top of the house.

Do you mean the roof of the house? Yes.

The ceiling of the room? Yes, Sir.

There was a bed in the room? Yes; about the bed too.

Did he say why he did so? Because none of us would drink.

You said there was a bed,—did you remark any straw about

the bed? Yes, there was a good deal of straw about the foot of the bed.

Do you recollect seeing Mrs Connoway in Burke's house? Yes, Burke sent for her, and she came.

Was that at the time the whisky was sprinkled? Yes, Sir.

You say Burke was apprehended that night? Yes.

Were you shewn the dead body in the Police-Office on the Sunday? Yes, Sir.

Did you recognize that body? Yes, Sir.

Whose was it? It was the same woman that I saw in Burke's house on the Friday night.

Cross-examined by the DEAN of FACULTY.—Do you know, Mrs Lawrie, that that straw that you speak of was used as a bed? Yes, Sir.

Did the Grays lie there? Yes.

It had been used for some time as a bed? Yes, Sir.

HUGH ALSTON.—*Sworn by* LORD MACKENZIE.

Interrogated by Mr ALISON.—Do you live in the same land in which William Burke's house is situated? Yes, Sir, I live in the first flat up stairs, and Burke lives in the sunk flat below the shop.

The shop is between your house and his? Yes, Sir, exactly.

Now, Sir, do you recollect on the night of the 31st October, when you was going home, hearing any noise there? Yes, Sir, I did.

What hour was it? I could not speak to the exact minute, but it was about half past eleven.

Were you going along the passage at that time, which leads up to your house? Yes, Sir, I was.

You were going along the passage that leads to your house, on the line of the street? Yes, Sir.

What did you hear, Sir? I heard, as it were, two men quarrelling and fighting, making a great noise; there was a woman's voice that attracted my particular attention; the cry of a woman, of murder.

What did you do upon that, Sir? My wife, who was with me, went up to my house, and I went down and stopped a little upon the stair to see that there was no person upon the stair till I ventured down to the bottom.

You know Connoway's door? Yes, I believe that is the door next to the passage.

Did you go as far as it? Near to it, within a yard or so of it.

Now, tell us as distinctly as you can, the different sounds you heard when in that situation.

LORD JUSTICE-CLERK.—You listened there? Yes.

Mr ALISON.—Well, what did you hear? I heard these two men making a great noise, as if wrangling or quarrelling. I heard no strokes or blows,—I heard a woman crying murder, but not in that way as I could consider her in imminent danger herself.

Well, Sir, What more did you hear? That continued probably for half a minute, or a minute,—she still continued to cry murder,—it was a very strong voice for a female voice;—standing there a minute or two, there was something gave a cry, as if proceeding from a person, or animal, that had been strangled.

That of a person, or animal, that had been strangled? Yes, I could hardly distinguish it from that of a human being.

Well, Sir, at this time did you hear any noise on the floor? I heard these two mens' voices, but I could not say that I heard anything else.

No blows? No, just a great deal of noise they were making by speaking.

Very loud? Yes.

Now, after this remarkable sound had ceased, did you hear the female voice still crying murder? Yes; she struck upon something, I do not know what she struck with, but slapped the door as if crying for the police, and cried, 'murder here.'

Well, Sir, did you remain any length of time there? After this I went for the police;—I was often afraid of fire,—and I went for a policeman, but I could not find one.

Did you return to the stair then? Yes, I did not go far down,—I went down a little way.

Did you hear any thing when you returned the second time? I heard the men speaking, and the woman ceased to cry murder;—I thought every thing was over;—they seemed to have removed to a greater distance, and the noise had ceased.

Now, in the course of the time you were listening, did you hear any wrangling or struggling at that time? I might hear feet moving on the floor, but I can't say more.

A JURYMAN.—I wish to ask the witness a question.

LORD JUSTICE-CLERK.—Take a note of it, the counsel for the Crown and the prisoner, must first be done.

Mr ALISON.—How far might you be from Burke's door when you heard the sound? It could not exceed three yards, or so;—it might be about three yards, but I do not think it exceeded that.

Do you mean the door of the house, or the passage that leads to the house? The door of the passage that leads to the house.

Will you be so good as tell us how far Burke's door is from that passage? I never measured it, I think it would be about fifteen feet.—I was three yards from the outer door.

There is a turn in the passage? Yes, Sir, there is.

Was the outer door shut? I was not so far forward as to see that; it appeared to me that it was on that door the woman struck. It was on the door of the passage, not the door of the room.

You heard that a body was found? Yes, in the evening of Saturday, about seven or eight o'clock.

Did that circumstance of a body being found fix your recollection of what you have mentioned? Yes, I recollected immediately.

Cross-examined by the DEAN OF FACULTY.—When you went for the police, where did you go to? To the mouth of the passage above Burke's passage. I saw one at the top of the street, but he was without my cry; and when I returned, I did not consider it necessary to get one, as the sound had ceased a good deal.

Did you go down to the Grassmarket? No.

The woman that made the noise on the door, struck on the door, and called murder; did you believe the voice you heard came from her? It was the same identical voice that called murder, that *took me* down the stairs.

That was not the voice of the woman, that struck on the door, if she cried at the same time, and said there was murder? Yes, I think she said, 'for God sake get the police, 'there is murder here.'

LORD JUSTICE-CLERK.—Are we to understand you to say Sir, that that voice that was uttering these cries, of a person or animal strangling, was different from that of the woman calling murder? Yes, it was quite different.

DEAN OF FACULTY.—I think I have it down quite distinct; it was on the door, not the outside door, that the woman was striking; how do you know that, when you was three or four yards from that door? I tried the experiment since on the door of the room; a person was shut in, and he struck the side of the room door, and I said that was not the sound, but the outer door.

A JURYMAN.—You mentioned having heard cries of murder proceeding from the passage, do you think they proceeded from Burke's house? I have no doubt of that, Sir.

ELIZABETH PATERSON.—*Sworn by* LORD PITMILLY.—*Interrogated by* Mr WOOD.

How old are you? Going in sixteen.

Will you look at the prisoner here, *(Burke standing up)*, Burke you have known in one instance? Yes.

You live in Wester Portsburgh? Yes.

Do you remember seeing him on Friday the 31st day of October last? Yes.

He came into your mother's house? Yes.

Your brother lives with you? Yes.

What is his name? David Paterson.

What time did he come? He came at 10 o'clock.

Who did he seek then? My brother David. I told him he was not in, and he went away.

Did you, next morning, go to inquire for Burke? Yes, my brother sent me down for him.

You got a direction to his house? Yes.

Who did you ask for it? Mrs Law.

DAVID PATERSON.—*Sworn by* LORD PITMILLY.—*Interrogated by* Mr WOOD.

Where do you live Paterson? No. 26, West Port.

What is your occupation? I am keeper of the museum belonging to Dr Knox.

Would you look at the prisoner here, Burke, *(Burke standing up)*; do you know him by sight? Yes I do, Sir.

Do you recollect at what hour you went home on the night of Friday, the 31st October last? It might strike twelve, Sir, or a little before it.

Now, did you find any body at your door? Yes.

Who? The prisoner at the Bar.

Was he rapping at the door? Yes Sir.

Had you any conversation with him? He told me that he wanted to see me at his house.

Did you go with him to his house? Yes.

Did you find any person in it? Yes, both men and women.

How many men? Two; there might be more.

Two besides Burke? No, Burke and another.

Did you see any women? I remember two, Sir.

Now, Sir, after you went in there, what passed betwixt you and Burke? He told me he had procured something for the doctor, pointing to a corner at the head or the foot of the bed, I do not know which.

Was there any straw there? Yes.

Lord Advocate.—Was it to that place where the straw was, that he pointed? Yes, my Lord.

Mr Wood.—Did he make that observation loud enough that the other persons in the room might hear him? They might; but I am not sure of that.

Was it in a whispering voice? It was in a low voice.

How near were you? I might be touching his clothes.

Were there any observations made by any of these persons? No, none.

Was any thing shewn to you at that time? No.

What did you understand to be the meaning of what Burke had said to you, when he said that he had procured something for the Doctor? I understood that he alluded to a dead body, a subject; but I had no proof of it.

He said that, pointing to the head or foot of the bed where there was some straw? Yes.

What were his words? I think he said that he had procured, or there was something for the Doctor.

Did he say to-day or to-morrow? To-morrow.

What quantity of straw was lying at the bed; was it such as a body might be concealed under it? I think there might.

Now, will you look at this woman at the Bar, M'Dougal, *(M'Dougal standing up).*

Was she one of the women? Yes.

Would you know who the other woman was if you saw her now?

(Mrs Hare was brought into Court in custody of a Macer, and produced to witness.)

Is that her? Yes.

Would you know the other man? Yes, I think I would know him also.

(Hare was also brought into Court, and produced to witness.)

Is that him? Yes.

Then you went home? Yes.

And you had no farther conversation with him? No farther than saying good night, or so.

But nothing farther about the thing he said he had got? No more.

You sent your sister for Burke? Yes.

Did he come to your house? Yes.

About what o'clock? About nine.

Mrs Hare was the other woman that was in Burke's house? Yes.

And Hare was the other man that was in Burke's house? Yes.

Did you know the name of these two persons? Yes, by the name of Hare.

Now, Burke came to your house next morning about nine o'clock:—Did he accompany any body, or bring any body with him? No.

Well, what passed? I told him if he had anything to say or do with Dr Knox, to go to himself and settle with him.

Lord Advocate.—You mean by that, that if he had any subject to take it to him? Yes.

Mr Wood.—What did Burke say? He promised to do so, and went away.

Well, when did you see him again? I again saw him standing in Dr Knox's room with Dr Knox, and one of his assistants, Jones; they were merely standing together.

Is Dr Knox's room in Surgeon Square? Yes.

About what hour? It might be between 12 and 2.

Well, did anything pass in your hearing at that time? He told me he had brought something for Dr Knox.

Was it Burke or Hare? I am not positive;—but one or other of them told me they had a subject,—and I got orders from Dr Knox if they brought any package, I was to take it from them.

Did you remain there? I called in the proper place in the evening about 7 o'clock, and they brought a package,—Burke, Hare, and a porter.

Do you know the porter by sight? I have since heard that his name is M'Culloch,—I have seen him here to-day.

Had they any thing with them? A box, apparently the remains of an old tea box, or tea chest.

Such a box as that, *(pointing to the old tea box)*? Yes, such a tea chest as that.

Then, what was done? They carried it and put it into a cellar belonging to Dr Knox;—Mr Jones was present. We locked the door,—and Mr Jones and I walked out to Newington, and told him what the men had brought.

Dr Knox resides at Newington? Yes.

Did Burke and Hare go along with you? They had followed us,—we saw them at the end of the road leading to Newington.

Before or behind you? I am not certain whether before or after.

But when you came out of the Doctor's house you found them there? Yes.

Did you observe any women there? I did not observe any; but they might have been there.

Lord Meadowbank.—Not the porter, but just them two? The porter also, my Lord.

Mr Wood.—When done, and when you met them there, what passed? Dr Knox had given me £5 to give to the men. I had previous orders to divide the money and give each a share. I went to a change-house and obtained change; I gave each £2, 10s. and on that, Hare and Burke lifted up their share, and the porter got his share.

Was this the whole price? No, they were to call on Monday, when Dr Knox would have seen what they had brought.

When they were to get more? I do not know if any bargain was made, but I understood, generally, the price to be £8.

And you parted with them there? I parted with them there.

Lord Advocate.—Did you see any men there? None.

Neither before you went in, nor afterwards? None, my Lord.

Did you see any women waiting about the square? None.

Did you see any women loitering about the public-house? None, my Lord.

You did not see them join any women? No, my Lord, I went another road.

Next morning, did any body call upon you? On the Sabbath morning, about 7 o'clock, the police Sergeant-Major called upon me, along with Lieutenant Paterson. It was Sergeant-Major Fisher.

And you went to Dr Knox's premises along with them? Yes.

And you opened the cellar and gave them the package that these people had left there the night before? Yes.

It was then in the same state as it was in when you got it? The same, my Lord, as I received it.

Was it roped? Yes.

And the ropes were still about it? The ropes were still about it.

Did you then open the box? Yes.

What did it contain? The body of an elderly female.

Was it fresh? Apparently fresh.

Had it ever been interred? No, my Lord.

Did you open the top of the box first? I could not positively say whether it was the side or the top of it.

Describe the situation in which it was? When we opened the box it was doubled up,—all the extremities doubled upon the chest and thorax.

How was the head pressed down? The head was pressed down on the breast.

Did it seem to be pressed down for want of room? Yes, it did.

Was it taken out of the box? Yes, my Lord.

Will you describe the state of the body, and appearance of the countenance? Yes, my Lord. I examined all the body, and stretched it on the table.

Describe it about the face? I found the face a very livid colour.

Was there any blood upon it? There was blood flowed from the mouth.

You are a medical person. Did that appearance of the countenance indicate strangulation? It did, my Lord; or suffocation, in my opinion.

And what other appearances had it? I found no other external marks, or bruises upon the body, that might have led me to suppose it to have caused death.

Did you find any internal derangement? I was not present at the examination.

Lord Meadowbank.—Did the eyes project? No, my Lord.

The tongue hang out? No, my Lord.

Lord Advocate.—You say the head was a good deal pressed down by the want of room? Yes, my Lord.

You can't say more upon it than that, of course? No, my Lord.

Lord Meadowbank.—Did you observe any marks about the mouth? No, my Lord.

Was there plenty of light when you examined it in the morning? Yes, my Lord.

Lord Advocate.—About the lips or nose were there any signs of pressure? They were dark-coloured, my Lord, and some spots of blood.

Any marks about the throat at all? None, my Lord.

Interrogated by the Dean of Faculty.—You said that the face indicated strangulation or suffocation? Yes, my Lord; by the blood, my Lord.

Does the blood of a strangled person, or a suffocated person, tend to give the face a livid and dark appearance? Yes.

Is that the reason? Yes.

Paterson, you have seen the man Hare before, that came into Court, and you looked at? Yes, my Lord.

You know that Dr Knox had dealings with him for dead bodies? Yes, my Lord.

Before that time? Yes, my Lord.

You know whether he had dealings before with Burke about subjects? Yes, my Lord.

Did they seem to act conjunctly? Yes, my Lord.

Who appeared to be the principal parties? I have seen both in their turn.

You have seen both assume the principal part? Yes, my Lord.

Did they frequently bring subjects that had not been interred? Frequently, my Lord, I suppose they had not been interred.

LORD MEADOWBANK.—The same persons? Yes, my Lord.

Is it frequent that such subjects are brought to the lecture-room of some anatomist? Yes, my Lord, it is frequent, both by them and by other persons.

Both by them and other people? Yes, my Lord.

DEAN OF FACULTY.—Does it consist with your knowledge, from acting for Dr Knox in this way, that there are people in town that sell dead bodies that have not been interred? I have heard it, my Lord. I have known gentlemen that have attended poor patients that have died, and then they afterwards gave in a note of their place of abode to Dr Knox, which he has handed to these men to get their bodies.

LORD MEADOWBANK.—It is no evidence of the fact.

DEAN OF FACULTY.—Have you seen young men that have attended these places deliver these addresses to Dr Knox? I have got one from Dr Knox to give to these men.

A label to the house of the deceased,—to the house of the late patient; and you have given it to them. And in that instance, do you know that the subject was brought to you? Not in that instance.

LORD ADVOCATE.—I would be the last person in the world that would interfere with the examination of the prisoner, but surely it is not *cross*. He can summon the witness, and call him again.

DEAN OF FACULTY.—I am entitled to re-examine him.

LORD ADVOCATE.—Independent of that, it has no bearing in this case.

LORD JUSTICE-CLERK.—You have told us that a minute examination was made of that body, What did you do with that body? I gave the Lieutenant of Police the key of the room where it was, and left it in his charge, and I never saw it afterwards.

Where is that room, Sir? A room and cellar in Surgeon Square.

DEAN OF FACULTY.—You say you laid down the money in shares, to prevent quarrelling? To prevent disputes.

You saw the £5 equally divided? Yes.

Have you known quarrels between Burke and Hare, re-

spoiling such booty? I have seen them drunk on the streets, and have heard disputes and quarrels between them.

More than once? Yes, my Lord.

Often? Yes, my Lord.

Had the one complained to you against the other, or to Dr Knox, with your knowledge? Not to my knowledge, my Lord.

A JURYMAN.—When he said he had got something for the Doctor, might his wife have heard it? She might have heard it.

Did she make any remark? No.

LORD ADVOCATE.—How far was she from him? She was not far from her husband; the room was but small, and she could not but hear.

LORD MEADOWBANK.—You mean by his wife, that woman at the Bar? Yes, my Lord.

LORD JUSTICE-CLERK.—When you came home that night, and went to them, near 12 o'clock, were they in a state of intoxication? Yes, my Lord, they appeared to be, both of them.

Both men and women? Yes.

LORD MEADOWBANK.—Did they know what they were about? They were able to stand up; but I do not know if they knew what they were about.

LORD ADVOCATE.—You accompanied Burke from your house to his house? Yes.

Did he walk tolerably straight in that way? Rather a little *drunkish-ways.*

JOHN BROGAN.—*Sworn by* LORD MEADOWBANK.

Interrogated by Mr ALISON.—You know Burke the prisoner, and Mrs M'Dougal, his wife? Yes.

Do you remember last Halloween evening? Yes.

Were you in Burke's house in the course of the evening of that day, betwixt six or seven o'clock? About four o'clock.

Who was then in the house at that time? That man and his wife, (*pointing to the prisoners,*) Hare and his wife, and there was another man, Gray, and his wife.

How long did you remain at that time? Till seven.

During that time, was there any other person came in? There were two strange women in when I went in first.

Did you see an old woman there? Yes.

Did this old woman remain as long as you remained there? Yes Sir.

When did you next return to Burke's house? Two o'clock in the morning.

You had not been in the house in the interval, betwixt seven and two? No.

Who did you then find there? The two men, Burke and M'Dougal, and Hare and his wife.

Did they lie in the bed? Yes; Hare and his wife were lying in the bed.

Where was Burke and M'Dougal? They were standing *out ow'r* next the window.

Were they talking together? Yes they were.

Did you fall asleep in the house? Yes, I fell asleep.

Did all the rest fall asleep too? Yes.

Where did you lie? Burke's wife and the other woman and me lay near the fireside; the two women were at the fireside, and the two men were in the bed.

When did you leave the house? About 7 in the morning.

What time did you come back? About 9 o'clock.

In the morning of Saturday? Yes.

Who did you find there? Gray and his wife, Burke and his wife, and Hare and his wife.

Did any person ask about the old woman? Yes.

Who was it? The person that came in for a light.

A man or a woman? A woman.

Well, what did the woman say? She asked what had become of the *spaewife*.

Now, what did M'Dougal say? She said that she had been very *fashous* during the night, and that in the course of the night, Hare and Burke began fighting, and the old woman called out murder.

Say what was the answer? She seemed to be very *fashous;* she gave her warm water, and then cold water, and then she asked for a flannel clout and soap to wash herself with, to make her white; and then the two men began a fighting, and she roared out murder, and she gave her a kick in the ——, and set her to the door.

Who called out murder? The old woman,—and she thrust her out of the house, for an old Irish *limmer*.

Were you there again in the course of the forenoon, that is, in Burke's on Saturday? Yes, about nine o'clock in the morning.

Did you see any spirits sprinkled? Yes.

When? Before nine.

When you came back? Yes.

Who sprinkled? William Burke.

Where did he sprinkle it? First on the roof of the house, then on his own bosom, and then he flung it under the bed.

Had he any thing in his hand, when he flung it under the bed? A cup with whisky in it.

What time was this? Before nine.

Did he go under the bed? Yes.

Had he the cup? Yes.

Was there whisky in it? No.

Burke went out leaving you sitting on the chair? Yes.

Was that near the bed? Yes.

You did not sit long there when he went out? No.

When you came in, did he tell you to sit down there, and not leave that chair? Yes, as he was going out for drink.

Was M'Dougal in the house at that time? Yes.

Were the Grays there? Yes.

Must M'Dougal have heard the direction to you to sit upon the chair till Burke came back? Yes.

But you went away? Yes.

And who did you leave in the house when you went out? M'Dougal, Gray and his wife.

MRS GRAY.—*Sworn by* LORD MEADOWBANK.—*Interrogated by Mr* WOOD.

Do you know the prisoners, Burke and M'Dougal? Yes, Sir.

You and your husband lodged in the house? Yes.

Five nights in October last? Yes, Sir.

Do you remember on the 31st of October last seeing a stranger there? Yes.

A poorish-looking woman? Yes.

How was she dressed? She had a dark gown, and a red stripped bed-gown on below it.

The black printed gown above it? Yes, Sir.

(The Witness was shown the gown and bed-gown, which she identified.)

Did she say her name? Docherty.

You saw her there once or twice in the course of Friday? Yes. I was in the house till very near dark at night.

You were going in and coming out of Burke's house? Yes; sometimes going messages.

LORD ADVOCATE.—Did Burke say any thing about her,—how he had met that woman? He said he had met her in a shop about *nine* that morning.

You and your husband were lodging in this house, were you? Yes; and we went home to another.

You did not lodge there that night? No; Burke put me out, saying, that you and your husband have had a difference,

and been boxing, and he would not have his house made a boxing-house. I told him I was not boxing, I was checking the child, and that was all the noise that I heard; and he told us that we must go out of the house that night directly.

Were you to go for good and all, or for a time? He did not say so directly.

Did he say that you should leave the house then? Yes.

What time? I could not say the time exactly; I think between five and six.

Did he leave you to find your lodgings for yourself? No; he said he would pay my lodgings for me that night.

Did he point out to you where you were to lodge? Yes; William Hare's.

You were to get your lodgings there? Yes; that night, Sir.

Did you go to Hare's then? Yes; I went with Hare's own wife.

She had been in Burke's at the time? Yes, Sir.

Did you remain at Hares, or return to Burke's house? I returned to Burke's house about nine o'clock; I returned for some of my child's clothes.

Did you find the woman Docherty there? Yes; she was singing, and Mrs Burke and Mrs Hare were dancing.

Did you leave her there? Yes; I left her there.

Did she seem to wish to go out of the house? Yes; in the course of the day.

Who kept her? Mrs Burke wished her to lie and take a sleep in the house.

Did Burke go out when you was there? No; I did not stop any length of time.

Hare and Burke were drinking, and the two women dancing? Yes.

What time did you return to Hare's? Shortly after.

And then, on going to Hares, you went to bed? No; I did not go till eleven o'clock.

Did Hare and his wife come home that night? Yes; they came home and took their supper; and Mrs Burke then came in and took some supper, and then Hare and his wife went out a little after them.

Hare did not return that night? No, Sir.

Now, when did you meet them next morning? I do not recollect what hour it was; but the first thing that I heard, was William Burke seeking for my husband.

What was he wanting with him? To give him a dram of spirits.

Well, did you go after that to Burke's house? Yes; me and my husband.

What o'clock might that be? Past nine o'clock on the Saturday morning.

Who did you find there? One Mrs Law, and Mrs Connoway, and one of the name of Brogan, and Mrs Burke, and Burke also.

Was the old woman there? No; and I asked where she was.

Who did you ask at? I asked at Mrs Burke.

What did she say? She said she was too impudent, and she turned her out.

Did you say any thing in answer to that? Perhaps she had got too much liquor, and she had not known what she said.

Was the old woman in liquor the night before? Yes, she was.

After you got into the house in the morning, was you looking for any part of your child's clothes? Yes; for the child's stockings.

Where did you go? To the corner where the straw was lying.

Well? Burke asked what I wanted there; I told him I wanted the child's stockings; and he said keep out there, with a *nod.*

Was there any whisky going at that time? Yes, Sir.

What was he doing with it? William Burke was drinking some of it, and throwing it up to the roof of the house, upon the bed, and below the bed.

Did he give any reason for doing so? That he wanted the bottle *toom* to get more.

Did you see him pour any whisky into a cup? He went with it three times under the bed;—he put it into a cup, and went three times under the bed, and put some on his breast.

Was there anything said about potatoes? It was William Burke,—the potatoes were under the bed.—I went in below the bed, and he asked me what I was doing there with a lighted pipe; to come out and he would go in himself,—and I said there was nothing in it, and I collected them myself.

Where was the straw lying? At the foot of the bed, in a little corner betwixt the end of the bed and the wall.

How long did you remain in the house? I was out two or three times in the middle of the day.

When you came back at any time, did you find Brogan there? Yes, Burke told Brogan to sit upon the chair till he came back again.

The chair was near the straw? Yes.

Was your husband there at the same time? Yes, Sir.

Burke you say went out at that time? Yes, Sir.

Did Brogan stop in? No.

Had you been desired to clean the house at all? I cleaned the house, but I was not desired to do it.

Did he say anything to that? He said never to mind, it would do; and I said it would be better to be washed and sanded.

Did he say anything about the corner? He ordered Brogan to sit at the corner, and not to let any person near it.

He did not say to let any person there? He just told him to sit there. After Burke went out, Brogan went out after him.

Was you and your husband then left alone? Mrs M'Dougal was along with us, she was stretched on the bed.

Now, what did you do after Burke had gone out? I went to look for Burke, but I could not find him.—I went out again and met Burke coming up the West-Port; he went into one M'Kenzie's to get a dram, and told me to go home, and he would be immediately after me?

Who did you find there? Brogan and Mrs Burke.

Did you discover a dead body in that house at the time? Yes, in the darkening.

Who was in the house at the time? Mrs Law's servant girl.

Was that long after Burke went out? About darkening.

Where did you find it? Under the straw at the foot of the bed.

Had you been looking on purpose? Yes, I was looking on purpose. I thought there was something that was not right; because he was throwing about the whisky. I thought something was not right; and the first thing I got, on lifting up the straw, was the woman's right arm.

What woman? Mary Docherty.

That was the woman you had seen the day before? Yes.

Were there any clothes upon her? Not a stitch.

Was there any blood visible? Yes; my husband lifted the head by the hair, and saw the face a little over with blood.

Where? About the mouth and on the one side of her head.

Was there much straw upon it, or how was it lying? On the right side, Sir, with her face to the wall.

Did you leave it there? Yes, just threw the straw upon it,—my husband went away before me,—he met Mrs Burke on the stair,—I went out immediately after.

Did you see him meet her? Yes.

What passed at that time? He asked about the body, and she told him to hold his tongue, and she would give him a few shillings; and if he would be quiet, it might be worth ten pounds a-week to him.

Did you say anything about the body? I turned back and went into the house.

What passed then? I spoke to her about the body, and she bade me hold my tongue.

Did you say what body it was? I told her it was the woman's that was well last night, singing and dancing on the floor.

Did anything more pass? She bade me hold my tongue.—She did not know that I heard her speak to my husband,—and she said she would give me 5s. or 6s. if I would hold my tongue.

What more? She repeated the words over again; and if I and my husband would be quiet, it would be worth £10 a-week to us; and I said, God forbid that I would be worth money with dead people.

Did you give information after that to the police? It was my husband.

Did you see Burke after that? No, Sir.

Lord Advocate.—Did you see the body in the police-office? Yes.

The same body? Yes.

Was it old Mrs Docherty? Yes.

Did you see Mrs Connoway at all, that day? Yes.

Did you see her after the body was found? Yes.

Was the body there then? Yes; I sent her forward to the corner to see it, but I did not see it; I cannot say whether it was there or not, Sir.

Interrogated by the Dean of Faculty.—Mrs Gray, let us go back to the beginning of the story. Where did you sleep on Thursday night? On the bed at the side of the press.

You say you was in Burke's all the Friday forenoon? Yes. Sir; I was not out in the forenoon, I saw the deceased woman's bed-gown drying. She washed them herself, that was Docherty, and dried them.

Did you not go out all the forenoon till about darkening, when you left it? Only for a stoup of water, Sir.

There is a well in the court-yard, is there? No, in the West Port.

Now, you went away to Hare's about dark;—you said you came back about night? Yes; for my child's clothes.

Nobody came and asked you to come down? No.

Nor your husband? Not that I know of.

Did you hear any thing of a merry making in Burke's house? Nothing; but as I thought it was Halloween night, they did not wish me amongst them.

Did your husband go back with you when you went for the clothes? Yes.

Now, then, it was about 9 o'clock when you went back the second time? Not passing a few minutes.

Was it not in Burke's that the dancing and singing was? Yes.

You know Mrs Connoway? Only by sight.

Was she there? Not that I saw, Sir.

Endeavour to recollect; was she there or not at that time? I do not recollect; she might, but I do not remember of seeing her.

Now, you went away in a few minutes. You said that Mrs Burke, or M'Dougal, came afterwards to Hare's house? Yes.

And Hare came home? Yes.

Did Mrs Hare come home? Yes.

Did M'Dougal come? She came in a few minutes after.

Recollect about what time that was? I could not tell you, Sir, the hour; it was not very long after I left Burke's house the first time; I left it at the darkening.

Was it before you went down at 9 o'clock? O yes, Sir.

It was before you went back for the clothes? Yes; before I went back for the clothes.

Now, be so good as recollect, when they came to supper there, did not they ask you to come down and get some sport with them? No.

Next morning, you said that Burke came up to your house, and asked you and your husband to come down? 'He did not ask us to come down, when he gave us a dram that morning; but my husband had seen Burke afterwards on the street, and he told him to come down with me to breakfast.

Now, when you went down to breakfast, did you see Hare and his wife there? No.

Are you sure Mrs Hare was not there? No, not in the morning.

Was she not in the bed? No.

She had come up to her own house, and she came up before you came away to your breakfast? Yes; long before I came away.

What time did she come up? I do not know.

When did you get up in the morning? About 8 o'clock.

Now, you told us a good deal of what M'Dougal said when your husband spoke to her on the stair, and you went back into the house? Yes.

Did M'Dougal say anything else? Yes; she said, '*my God, I cannot help it.*'

Was that after you went back into the room again? Yes; when I went back and left my husband going away with the bundle.

Was he present at that time? Not at that time.

Did she say the same words on the stair? Yes.

Lord Justice-Clerk.—She told you and your husband, that she would give you two or three shillings if you would be quiet; and if you would be quiet, it would be worth £10 a-week to you; did these words, *my God*, follow or precede that? It followed that.

What was your reply? I said you surely can help it, or you would not stay in the house.

Did she make any reply to that? No, Sir.

Lord Meadowbank.—Am I to understand that she said these words to you, now mentioned, my God, I cannot help it; did she say these words after her offering the shillings, and promise of money, and you saying, God forbid that you would do so? It was after that, that she said that she could not help it.

It was to your reply, for the like of that? that she said that she could not help it? Yes.

Mr Robertson.—Request the witness' particular attention to that, my Lord.

Lord Meadowbank.—When you met the woman coming up the stair, what did she say? When my husband went up the stair, he met her, and mentioned to her that he had found a corpse in the house; and she said hold your tongue, and she would give him five or six shillings, or it might be only two or three; and she said that he might be worth £10 a-week if he would be quiet; and he said, God forbid that he would be worth that, for he could not keep it on his conscience. She came down the stair, and she went into the house, and I asked her what she had been about, I had found such a thing in the house; and she made the same reply as to my husband; and I said, God forbid that my husband should be worth that for dead bodies; and I asked her what did she mean by bringing her family into disgrace by it; and she said, my God, I cannot help it.

I think you said in giving that conversation before, that you mentioned to M'Dougal that it was the body of the woman you had seen in good health before, did she say any thing to that? No; she made no reply.

She said nothing as to how she came by her death?

JAMES GRAY.—*Sworn by* Lord Mackenzie.

Interrogated by Mr Dundas.—You and your wife lived

with the prisoner Burke, in the end of October last, five nights? Yes.

On the 31st of October, did you and your wife sleep there? No; not on the night of the 31st October.

Why? They desired us to go out.

What time of night was that? It was in the afternoon. He told us we must go out that night; that he had provided lodgings for us in another house; and desired us to come back next morning to breakfast.

He gave no reason for that? Not to me.

Did he take you to any house where to get lodgings? Yes; he took us up to Hare's house, and fixed the bed where we were to sleep in, himself.

In the course of that day, in the course of that Friday, did you observe a strange woman he brought into the house? He did in the morning. He said that he had met with her in a shop in the West Port. My wife was making breakfast at the time, and he desired that some breakfast should be made for her likewise.

Did he say why he did this? He did not at that time; but he said something afterwards. He said he suspected that she was a relation of his mother's, as she was of the same name, and from the same part of the country.

That was on the forenoon of Friday? Yes, Sir.

You told us that he took you to Hare's house? Yes.

Had you occasion to return in the evening again to Burke's house? Yes; I think about nine o'clock.

For some of your childrens' clothes? Yes, Sir.

Whom did you find in Burke's house? Burke and his wife, Hare and his wife, and a stranger woman.

Did you return back to Hare's to sleep, and left all those individuals in Burke's house? Yes; we did Sir, and went to sleep.

Next morning did you see Burke? Yes; and he asked how we rested, and I told him very well.

He asked you to come to breakfast? Yes; and I went back and got my wife, and we went down to breakfast.

In the course of that forenoon, (Saturday morning,) were you present in the afternoon when your wife found the dead body in the room? I was, Sir.

What time was this? About darkening.

Was it about five or six? I dare say it might be between five and six. I could not exactly detail the hour.

Where was the body found; in what part of the room? It was found in one corner at the foot of the bed, with the head to the wall, and the feet below the bed.

Lord Justice Clerk—Amongst the straw? Yes Sir.

Did you recognize the body? I did Sir. I knew it to be that of the woman that we saw there the night before.

On this discovery, did you remain in the house, or did you quit it? I packed up the things that I had in the house, and went out, when I met Mrs Burke.

That is M'Dougal, the prisoner at the bar? Yes.

What passed? I asked what was that she had got in the house; and she said, what was it? and I said, I suppose you know very well what it is: She fell on her knees, and said—

Did she drop in a supplicating attitude? In a supplicating attitude, imploring that I would not inform of what I had seen.

Did she offer you any reward for that? She offered me some money, five or six shillings, to put me over till Monday; and there never would be a week after that, but that I might be worth £10 a-week.

What did you do upon this? I said my conscience would not allow me to do it. After I came back, I heard her in the room, narrating the same words to my wife.

What were these words she said to your wife? They were words very nearly to the same purpose as those to myself, though they were not exactly the same.

Did she say she could not help it? Yes, she said so.

Was there any reply made to that? No Sir.

Not upon the stair? No, indeed. I did not stop long with her.

Now, after this conversation in the house, did your wife and you leave it? We did Sir.

And did Mrs Burke, or M'Dougal, follow you? She followed us, Sir; and when we got out to the street, we met Mrs Hare.

Now, what happened there? We met Mrs Hare there, and she inquired what we were making a noise about; and said, can't we go into the house, and decide our matters there, and not make a noise about them here.

And you went into a public house, and stopped there some time? Yes; and I went and gave information at the police-office.

Lord Mackenzie.—Were you in the house when the body was found? I was.

Did you observe the face of it? Yes; I turned up the face, to see what like it was: There was a little blood on the face.

Were there any marks upon it? It did not appear to be marked; and so soon as I saw it was the person that was there the night before, I did not take time to look at it.

Was it quite naked? Quite naked.

LORD JUSTICE-CLERK.—You were quite clear of the body? O yes, my Lord.

Interrogated by the DEAN OF FACULTY.—What time was it that you and your wife left Burke's on the Friday night first? I suppose it might be about five o'clock; but probably it might be a little after it.

Did you see him that night again before nine o'clock? Yes, he came up to Hare's house.

About what time? It might be about seven, if I recollect; but I am not sure of the hour.

Was Hare there at that time? No, neither Hare nor his wife were there; they were in his house, and came in afterwards.

Was Burke there at the supper? No; but Mrs Burke was.

What time was it that Burke came there? I think about seven.

Had the Hare's left it at that time? I cannot be certain as to the hour that he came there; but I know he came there that night, after the Hare's, but went out again.

When Burke came up there about seven, did he ask you to go to his house? No; he fetched a copper measure, with some liquor in it, that night at seven.

Did he sit with you any time? Only a very short time.

What brought him there? I do not know, except to give us this liquor that he brought to us, for he left it with us.

I think you said he came on the Saturday morning. Did he then ask you to come down to breakfast? I rose directly out of bed, and he desired Hare to give us a dram; and twice he did so. I went out a little afterwards, with the child in my arms, and I saw Burke standing in the shop; and it was then that he asked us to come down and get breakfast.

JOHN M'CULLOCH.—*Sworn by* LORD PITMILLY.—*Interrogated by* MR ALISON.

You know the prisoner Burke? Yes.

You know of his coming to your house on Saturday morning, the 1st of November, requesting you to come to his house and carry something? Yes.

About what time? Six o'clock.

On Saturday evening? Yes.

Did Burke say what it was to carry? No, my Lord.

Did he tell you where to go first? He told me to follow him.

And you followed him accordingly? Yes, my Lord.

Where did you go to? To the West-Port.

Did you go to Burke's own house, or any other house first? To his own house first.

What did you get there? A box.

What size of a box was it? Like a tea-box.

Lord Advocate.—Tell us more particularly what happened before that—before you moved the box? When coming to the end of the bed, he took some straw off it; and he took the sheet and he put it into the box.

And what did he take off next—what did he take out of the straw? I cannot say.

Did you see him put nothing in the box? The sheet.

Did he take any thing like the person of a human body? Yes; I think it was something like the person of a body.

Lord Meadowbank.—You have no doubt that it was a body, in short? No, my Lord.

Did you see any thing of it at all? No, my Lord; but when I was going to lift the box, there was something like hair that I felt.

And did you put that into the box? Yes; and there was a little straw put over it, and he ordered me to take it away.

Did you put the hair in the box? Yes.

Lord Justice-Clerk.—Recollect you are on oath; and you should understand distinctly, Sir, that whatever concern you might have had in it, you are bound to speak the truth, and the whole truth; for if you do not, the Court will be obliged to deal with you as with other persons in that situation, and one no further gone than yesterday. Was there a good deal of pressure required to put the body down? Yes, for putting the lid down.

Was there any other person present? Yes; one of the name of Hare.

Lord Advocate.—Was the head uppermost? I could not say, my Lord.

What became of the sheet? It was left where the box went to.

Is that the box? *(Witness was shewn an old tea-box.)* Yes, my Lord.

What kind of hair was it, was it a man or a woman's? My Lord, I do not know.

How long was it? About the length of that—*(showing one half of his hand.)*

Well, then, was this box roped? Yes.

And you carried it? Yes; he (Burke) ordered me to carry it, and I am a porter.

Did he tell you where to go to? I was to go down the Cowgate, up the High School Wynd, and he was to be immediately after me.

Did he meet you there? He told me to go to the head of the wynd, and he would meet me there.

Did he meet you there? Yes.

Was there any body with him? Yes; his wife.

Where did they join you,—they did not join you in the High School Wynd, it was farther on, was it? Yes.

Was there any body else there? Hare was there.

His wife, was she there? Yes; she is a big woman, she was there.

Then there were two women and two men there? Yes Sir.

Now, you went up the Wynd,—were they before you, or did they overtake you? They overtook me.

Before you got into Surgeon Square? Yes; all the *four*.

Mr Alison.—Then you went into a house there? Yes; and we went to the gate, and having put the burden off my back, I left it there.

About what hour was this? About half-past six my Lord.

This box and the body was taken into the house, and you left it there? Yes.

Where did you go to? To Newington,—Burke ordered me to go along with him.

Who went to Newington with you? Hare, Burke, and the two wives.

Now, when you went to Newington, did the wives keep along with you, or did they separate from you? They separated, and I stood alone.

Did the men go into any house, or did any body come to them? A young gentleman.

David Paterson; you saw him here to-day? Yes Sir.

You went into a house; did you get a dram? Yes.

Did Burke and Hare come in? I do not think that Hare went in.

What took place in the public house? This young lad gave them money.

Did you see money? I saw him give them money.

And they divided it? He gave them what was theirs, and nothing more.

You got paid for your trouble? Yes.

How much did they give you? Five shillings.

When you came in there, where were the women? were they left by the men there? No.

They had gone away before? Yes.

Lord Justice-Clerk.—Are you quite positive, Macculloch, that you saw this woman M'Dougal at Newington? Yes, my Lord.

And also Mrs Hare? Yes, my Lord.

JOHN FISHER.—*Sworn by* LORD PITMILLY.—*Interrogated by* MR ALISON.

You remember a person coming to you in November, of the name of Gray? Yes; about seven. He was in before I came into the office.

Where did you go with him? To the West-Port.

What house did you go to there? I went to the house of William Burke, the prisoner.

What did you go there for,—what was your object? From the statement of the person that came there, to inquire for any thing to establish what had been said.

Was it to search for the body? No; I understood that the body was removed before I went there. It was to see if I saw any thing suspicious.

What did you find? I found Burke and his wife coming out from the sunk flat, and they were coming up stairs.

Was there any body with you? Finlay and Gray. I desired the man to go back and speak with me down stairs; and they went down.

After you went into the house, what took place? I asked Burke what had become of his lodgers, and he said, that there was one of them, pointing to Gray; and that he had turned out him and his wife for their bad conduct.

What took place then? I then asked them what had become of the little woman that had been there on the Friday, the day before; and he said, that she was away: And I asked, when did she leave the house, and he said, about seven o'clock in the morning.

Did he say any thing about any other person being present when she went away? He said William Hare saw her go away. Then I asked, was there any other person saw her go away; and he said, in an insolent tone of voice, there were a number more. I then looked round the house to see if I could see any marks on the bed, and I saw the marks of blood on a number of things there; and I asked Mrs Burke, the pannel at the bar, how they came there; and she said, that a woman had lain in there, about a fortnight before that time, and the bed had not been washed since.

Well, what more? She said, as to the woman, she could find her; she knew her perfectly well, and that she lived in the Pleasance. She alluded to the little woman, that I had asked where she was; and she said, the woman can be found; she lives in the Pleasance; and she said she had seen her that night in the Vennel, and that she had apologised to her for her bad conduct the night previous. I asked her then, what

time the woman had left the house; and she said, seven o'clock at night. When I found them to vary, I thought the best way was, to take them to the Police office; and I told them that it was all personal spite, but that I must take them to the office, as I was sent down.

But, before going to the office, did you put any questions to Burke, or this other woman, (the pannel), how this woman came to the house? No; I put no questions to them on that subject.

Then, you went to the Police Office, and took them with you? Yes.

Had you any further conversation with them there? I heard them examined by the Superintendant. He examined them.

Did you hear any conversation between the Superintendant and Burke?

Lord Justice-Clerk.—Keep to *that*.

Witness. I told the Superintendant that I had seen some marks of blood there.

Well, did you return to Burke's house that night? Yes; the Superintendant, Dr Black, and I, went to Burke's house.

Did you examine the house then? Yes.

Did you find any article of wearing apparel there? Yes; at that time Mrs Law came into the house, and we found a striped bed-gown on the bed; and we took this striped bed-gown away.

Did you find any thing else? No.

And you took it away? Yes.

Look at it, (*a striped bed-gown was handed to the witness*), Is that it? Yes.

Did you find any blood? There was a quantity of blood amongst the straw under the bed.

Did it appear to have recently come there? Yes; it appeared quite fresh.

Now, next morning, did you go to Dr Knox's premises in Surgeon Square? Yes.

Was there a person of the name of Paterson with you? Yes.

Did you get any thing? Yes; we went down to the cellar, and he said that here is the box, I do not know what is in it; and we opened it, and found the body of a woman in it.

Lord Justice-Clerk.—Quite naked? Quite naked.

Mr Alison.—Was there any person sent for to come and see the body? Mr Paterson and I remained, and we sent for Gray to come and see if that was the body.

Did he recognize it in your presence immediately? Yes. We directed it to be put in, and I took the precaution to put a man on the door before I went away.

Did you return again? Yes.

And removed the body to the Police Office? Yes; the same day.

LORD JUSTICE-CLERK.—I suppose when you went there, Paterson looked at it, laid it out on the table, and examined it? Yes, in the cellar, in the lower flat of the house.

Mr WOOD.—Was the body shewn to Mrs Connaway? Yes.

LORD ADVOCATE.—Was there no other body but one in the Police Office? No other.

What took place then? They all denied it.

Denied what? Denied all knowledge of the body.

LORD JUSTICE-CLERK.—Of ever having seen it at all? Of ever having seen it, dead or alive.

Mr WOOD.—Did you, after that, return to Burke's house? Yes.

What did you find there? Part of a gown, and this petticoat—*(pointing to Campbell's clothes.)*

What else took place? The body was examined by Dr Black, Dr Christison, and Dr Newbigging.

Interrogated by the DEAN OF FACULTY.—Did Hare deny all knowledge of it? Yes; He said he never saw it, dead or alive.

Interrogated by Mr COCKBURN.—His wife the same, I suppose? Yes.

WILLIAM HARE.—*Sworn in the usual manner by* LORD MEADOWBANK.

LORD MEADOWBANK.—Now, we observe that you are at present a prisoner in the tolbooth of Edinburgh; and from what we know, the Court understands that you must have had some concern in the transaction now under investigation. It is, therefore, my duty to inform you, that whatever share you might have had in that transaction, if you now speak the truth, you can never afterwards be questioned in a court of justice; but you are required, by the solemn oath you have now taken, to speak the truth, the whole truth, and nothing but the truth; and if you deviate from the truth, or prevaricate in the slightest degree, you may be quite assured that it will not pass without detection; and that the inevitable result will be, the most condign punishment that can be inflicted. You will now answer the questions that are to be put to you.

LORD JUSTICE-CLERK.—You will understand that you are

called here as a witness regarding the death of an elderly woman, of the name of Campbell, or M'Gonegal.

You understand that it is only with regard to her that you are now to speak?—*To this question the witness replied, by asking,* '*T'ould* woman, Sir?' LORD JUSTICE-CLERK, Yes.

LORD ADVOCATE.—You are a native of Ireland, Hare? Yes.

How long have you been in this country? Ten years.

LORD JUSTICE-CLERK.—Are you a Roman Catholic? Yes.

Do you wish to be sworn in any other way, than that now administered by my brother? I never was sworn before, Sir, and I am no judge of that.

(The New Testament was handed to the witness, with a representation of the Cross upon it.)

LORD MEADOWBANK.—Now, you will observe that there is a representation of the Cross on the book of the New Testament; lay your right hand upon the Cross, and repeat the words of the oath again, after me.

(The witness was sworn in this manner.)

Interrogated by the LORD ADVOCATE.—How long have you been acquainted with William Burke? About a twelvemonth.

You have been ten years in Scotland, and you have been a resident in Edinburgh? Yes.

You are a married man, and your wife is here? Yes.

When did you become acquainted with the prisoner Burke? About a twelvemonth ago.

And you became acquainted with the other prisoner Macdougal about the same period? Yes.

She lodged with him then, and since? Yes.

Your house is near his? On the same side of the street.

Were you in a public house on the 31st of October last, kept by a person of the name of Rymer? Yes.

Were you and Burke drinking together on that day? Yes.

How much did you drink? A gill.

Was any body with you? No.

Did he tell you about any person being in his house? Yes.

About what o'clock was it? I could not say; it was in the fore part of the day. He took me to this house, and he told me to go down to his house, and said that there was an *ould* woman in the house that he was going to murder, and for me to see what they were doing; that he had left some whisky in the house; that he got the woman off the street; and that he thought she would be a good *shot* to take to the Doctors.

LORD JUSTICE-CLERK.—Did not you Sir, in the early part of this statement say, that he had got a *shot*, and that he was going to murder her for the Doctors? He said to me to go

down to the house, and to see the *shot* that he had; and see what they were doing in the house.

LORD ADVOCATE.—Did he use the word murder; or did you understand it from the *shot* for the Doctors? To see what they were doing.

Did he use the word murder? No.

What did you understand by the word *shot* for the Doctors; did you understand the meaning of it? Yes.

What was it? That he was going to murder her.

Well, did you go down? Yes, Sir, I went down.

Alone? Yes.

You went to Burke's house? Yes, I went to his house.

Who did you find there? A strange man and woman in the house; Nelly M'Dougal, and the old woman,—and she was washing her gown.

Do you know what the name of that strange man and woman is now? I could not say the name.

Is Gray the name, do you think? Yes, Gray.

And the woman was washing some linen things? She was washing her short gown.

Was it the old woman that was washing? Yes, she was washing her short gown.

What colour was it? White and reddish colour,—striped.

Was it like that there? (*the gown was handed to the witness,*) Yes, that is it.

Did you remain long there? About five minutes.

And then went away home? Went home.

Were you in Mrs Connoway's after that? No, I was not in there till after night.

You know that woman? Yes.

Were you in her house that night at all? Yes; between eight and nine o'clock.

Then you came back from that to your own house? Yes.

Now, who was in Connoway's when you was there? John Connoway and his wife; and there was William Burke, John Brogan, and another *chap*—I don't know his name.

Did William Burke remain with you? He went away with the two chaps, Brogan, and the one I don't know.

Who else were there? That old wife, and Nelly M'Dougal, and my wife.

Had you some drink when you was there? Yes.

Did you remain there till pretty late? We remained there till between 11 and 12 o'clock. I could not say just directly.

Where did you go to? Nelly M'Dougal asked me and my wife to take a dram in her house.

And you left the old woman there? Yes, we left the old woman sitting at the fire, and John Connoway.

Well, when you were in Mrs Burke's house, did Burke come in? Yes, and the old wife with him.

Had you any more drinking? Yes; there was a *soup* of whisky in the bottle, and we all drank it out. We were all pretty hearty.

Was the old woman that way too? Yes.

When you were in Connoway's, were you dancing and singing? Yes.

Did not she hurt her feet in Connoway's? I did not see.

At this time, did you expect that any mischief was to happen to this old woman? Not that night.

Now, after this, had you any quarrelling or fighting with Burke? He asked me what I was doing there, in his house: I told him that Nelly M'Dougal asked me in to get a dram; and he struck me then.

Did you strike again? Yes, I did.

Had you a fight? Yes.

And her there? Yes, we had.

Now, where were the women during this? They were *redding* us.

They came in betwixt you to separate you? Yes; he pushed me down twice on the bed, and the last time I lay on the bed.

How long did you lie there? I could not say.

Lord Justice-Clerk.—You were twice down on the bed? Yes.

Lord Advocate.—Now, when you were fighting, where was this old person? She was sitting at the fire,—and she got up and desired Burke to sit down, and she said that she did not want to see Burke abused.

Did she run out? Yes, she ran out twice to the entry, and cried out for the police.

She went out twice to the passage? Yes.

What did she call out? It was either murder or police, I could not say which, but it was some of them.

Well, how was she brought back again? It was Nelly M'Dougal that fetched her back.

Both times? Yes.

Did she then get any push, or fall over on the ground? Yes she did;—when we were struggling, I pushed her over a little stool.

And you continued to struggle while she lay there? Yes; she raised herself on her elbow,—she was not able to rise, being drunk,—and called on Burke to be quiet.

LORD JUSTICE-CLERK.—You mean quiet from fighting with you, or you with him? Yes.

LORD ADVOCATE.—Did he quit you at last? After he threw me the second time on the bed, he then quit, and I lay still in the bed.

What did he do? He stood on the floor;—he then got stride-legs on the top of the woman on the floor, and she cried out a little, and he kept in her breath.

Did he lay himself down upon her? Yes, he pressed down her head with his breast.

She gave a kind of a cry, did she? Yes.

Did she give that more than once? She moaned a little after the first cry.

How did he apply his hand towards her? He put one hand under the nose, and the other under her chin, under her mouth.

He stopped her breath, do you mean? Yes.

Did he continue this for any length of time? I could not exactly say the time; ten or fifteen minutes.

Did he say anything to you when this was going on? No, he said nothing.

Did he then come off her? Yes; he got up off her.

Did she appear dead then? Yes; she appeared dead *a wee.*

Did she appear to be quite dead? She was not moving; I could not say whether she was dead or not.

What did he do then? He put his hand across her mouth.

Did he keep it there for any length of time? He kept it two or three minutes.

Did she appear to be quite dead at that time? She was not moving.

What was you doing all this time? I was sitting on the chair.

What did he do with the body? He stripped it of the clothes.

Where did he put them? Under the bed.

What did he do with the body? He took it and threw it at the foot of the bed, doubled her up, and threw a sheet over her; he tied her head to her feet. He tied her head and feet together, and covered her up with straw.

Now, during the time this man was lying on her, where was M'Dougal and your wife? When they heard the first screech, they left the foot of the bed and went into the passage.

Did they both run to the passage? Yes.

Did they come in again when this was going on? They did not come in till this was all over, and her covered over with straw.

You said they were lying in bed before this time too? They were lying in bed with the rug over them.

Did they cover their faces with the rug? I did not see.

Where were you sitting at this time? At the head of the bed.

Did you see the blood? I did not observe any at that time.

No blood on the floor? Not any at that time.

Any blood on the woman's face? I did not see any at that time.

Did you hear these women cry any thing after they went into the passage? I did not take heed.

Nobody came in at that time? None.

Before the women sprang up, had you seen Burke turn the woman round, or do any thing at all to her? He was on the top of her when they sprung out of the bed.

Was he long in that position before they went away? A minute or two; whenever he catched her, she gave a screech, and they ran away.

None of them laid hold of Burke, and tried to screen the woman? None at all.

Which of them went out first, do you remember? It was my wife.

Did the other follow immediately? It was not long till she went out after.

Neither of them made any attempt to save this woman, or to take Burke off her? Not that I saw.

Could it have been without your seeing them? No, it could not.

Well, how long before this was it, that these women, as you describe lying in the bed, had been separating you and Burke? About ten minutes before this.

Then, you saw them come in again? Yes; they came in again.

Well, did Burke go out then? Yes; Burke went out.

Immediately after this old woman was laid in the straw? Yes; he immediately went out.

Was he long absent? About ten minutes.

When the women came back, did they say anything? did they ask no questions? No.

Did you say anything? No.

What did you do then? They went to their beds again.

Did neither of them ask for the woman Docherty when they came back? They did not.

Then you say Burke went out, and returned in about ten minutes; did any body come back with him? Mr Jones.

Was it not Mr Paterson? It was the Doctor's man. *(The Macer called Mr Paterson in Court, but he failed to appear.)*

Do you know where this man lived? He lives down on the other side of the street, in the West Port.

Well, when he came back with Burke, what did Burke say to him? He asked him to look at the body he had got; he said it would do well enough; to get a box and put it into.

Did he point to the straw where it was? Yes; and he wanted him to look at it; but he would not look at it.

Were the women present then? They were in the bed.

Were they awake? I could not say.

How long before that did you speak to them? None of them (the men) spoke to them; he, (Paterson), went out to the passage.

When they were in their bed they did not speak at all? No.

None of them said anything when Mr Paterson was present? No; I do not know.

Did you fall asleep before he went away? Yes.

You were tipsy, were you; were you quite drunk at that time, or did you know what you was about? O yes; I knew well enough what I was about, though I was *drunkish-ways.*

And you fell asleep, did you? Yes.

Did you know what time you awoke? Between six and seven in the morning.

Where did you fall asleep; where were you lying when you fell asleep? In the chair.

Were you in the chair when you awoke? I was, with my head on the side of the bed, in the chair.

Who was in the bed when you awoke? There were two women, and John Brogan, and his aunt lying behind them.

Who is his aunt? Nelly M'Dougal; he calls her his aunt.

Where was you lying? At the fireside.

Well, after this, when you got up, did you and your wife go home? Yes.

Who did you find at home? John Gray and his wife.

Had they slept in your house? They had fallen out with Burke that evening, and they applied to my wife for a bed.

You cannot say which of them applied? I cannot say which.

Did Burke ask no bed for them, or speak to you about a bed for them, the day before? I could not say.

Did he speak to your wife in your presence? I could not say, I did not hear him.

Did M'Dougal speak of a bed? I could not say.

There they were;—well, did Burke come back to you next morning? He came to Rymer's shop. I was going to feed the swine, and he called me into Rymer's shop, and he asked

me if I had got my morning; he called me to get a gill, and he asked me would I go with him to Surgeon Square to see about a box, and I told him I did not heed after I fed the swine.

Well, did you go to Surgeon Square? Yes, he inquired about a box there.

Where did you wait? I was in the room with him.

And you did not get a box there? No.

What did you do then? He said that he had one bespoke or bought, I do not know which, from Mr Rymer's shop-boy.

Well, tell us what happened afterwards,—was a box got? Yes, he bought a box from him.

Did you see it? Yes, but not at that time.

Did you see it brought into the house? Yes.

Who was it that brought it? It was the porter who brought it into the passage; and both him and I went into Burke's house with it.

Was Burke there at that time? No.

Did he come in? He did not come in till about a quarter of an hour.

Who was with him? A man, I do not recollect his name; he stands at the head of the Cowgate. There was no person in the house when we went in, and we left the box there and came out again; we went out at the back door, and waited till Burke came.

Well then, when he came, did you all go into the house again? He asked of me what was I doing, and said, you are little worth that did not put it into the box; and with that he went into the house, and when in the house, he went and pulled it (the body) out on the floor, and I helped it into the box.

Was there an old sheet there? Yes.

Did it require pressure to put it into the box? I could not say; it was the porter that stuffed it down, in the latter end. It took some strong presses down; he said that it was a bad thing to keep the hair on the outside; and he took it and pressed it down in the inside.

Well, was it roped this box? Yes it was.

Look and see if this is the box here? *(The old tea-box was shown to the witness).* I cannot say whether that is the box or not.

Was it of that kind? It was of the same shape.

Was it roped? Yes.

What was done with it? The porter took it away with him.

Did he get any directions where to carry it to? To Surgeon Square.

Did he and you go to Surgeon Square at the same time? Yes.

Did you overtake, or meet the porter there? I went with the porter, and Burke went for the Doctor's man.

And you all met in Surgeon Square? Yes.

Were the women there? They were not in the Square, but were following us.

The women were, M'Dougal and your wife;—you saw them in Surgeon Square? No, they were not in Surgeon Square, they were in the street.

That is, in the street in the High School Yards there? Yes.

Did you hear them say what brought them there? I did not.

Did you both go together into Surgeon Square, or did Burke come in first? Burke was last in coming in; we went in with the box; I could not say whether it was the porter or not that went in with the box first.

And you assisted them; did you? Yes.

And you all three went in, and the box was put down into the cellar? Yes.

Where did you go to? To the Doctor's house.

Where is that? At Newington.

Well, did you go into the house, or did you wait till the doctor's man came out again? No; we waited till he came out.

Had the Doctor's man, Mr Paterson, and you been talking of any allowance? Yes,—he went in, and came out and told us to go down to a public house at the foot of the Cowgate, and he would give us some money.

What became of the women, did you see them at Newington at all? We saw them on the road.

To Newington, you mean? Yes.

Going or coming? Both in going and coming.

They did not join you,—they did not come into the house? No.

Did you get money there? Yes; the man had five pounds.

And that was divided betwixt you? Yes; he gave the porter five shillings, and then he gave William Burke two pound seven shillings and sixpence, and me two pound seven shillings and sixpence.

Was this the whole price;—did you understand you was to get more? We were to get other five pounds by Monday.

Was that to be demanded on the Doctor's seeing the body? He did not say.

Well, then you went home;—did you hear any more of the matter till you was apprehended? Yes, I saw him, (Burke), apprehended that night.

When was you apprehended? Next morning, Sabbath morning.

Interrogated by Mr Cockburn.—*Mr Hare*, how long do you say you have been in Edinburgh? About ten years.

What have you been employed at during all that time? Boatman and labourer.

You have not been boatman all that time? Yes.

Where? On the Canal.

Have you been employed in any other way? I had a horse and cart selling fish.

Any other way? No.

Have you been connected in supplying the doctors with subjects upon other occasions than those you have not spoken to yet? No,—than what I have mentioned.

Lord Advocate.—I object to this course of examination.

Mr Cockburn.—I request the witness to be withdrawn. *(Witness was withdrawn.)* My Lords, I asked the witness, whether part of his occupation, during the time he has been here, was in supplying Medical Lecturers with subjects; and he said that he had been so employed. Now, the question that I wish to ask him is, Whether that was his trade and living, *on other occasions?* And this, as I understand, is objected to. But I would not be doing justice to the panniels or the Court, if I did not insist on putting that question. And I may avow, that it is only introductory; and as it may facilitate the consideration of the point, I may as well explain at once, that I hold myself entitled to ask this man to reveal his whole life and conversation. In particular, I mean to ask him this specific question,—Have you ever been concerned in murders beside this one? I am ready to admit that he is not bound to answer; but I am entitled to put that question, let him answer it or not as he pleases. It will be for the Jury to judge of the credit due to him, after seeing how he treats it.

Lord Advocate.—The caution that was put to this witness was, that he was not to speak to any of those cases, except the one under investigation; and how he can be asked with regard to them now, in this state of the proceedings, to me is inconceiveable.

Lord Justice-Clerk.—I do not think that the general question, if he ever supplied the doctors with subjects, ought to be put; at least, I am bound to tell the witness that he need not answer it unless he pleases.

Lord Meadowbank.—When we are gravely and impera-

tively called upon to tell the witness so, for what purpose is it that that question can be put, when the witness is told that he is not bound to answer it, I cannot discover; but further, I have to state this, that the witness is brought here to be examined on the matter before the Court, and he cannot, in any circumstance that may be disclosed in that evidence, be examined on a cross-examination; he cannot be called on to answer other matters. And is he to be exposed to suppositions because he does not choose to answer that question? It would be subversive of every principle of justice, because the Court cannot protect him. Upon that ground, I submit therefore, that it is not a fit and proper thing to allow such a question to be put, when he is not called upon to answer it, and when your Lordship's power would not protect him if he did answer it. I hold it to be the duty of the Court not to allow that question to be put.

Mr. Cockburn.—Your Lordship will observe that I have only stated what the proposed question is, but that I have not been heard in support of it. Indeed, I could not have been heard upon it, because it has not yet been objected to by the prosecutor. Nevertheless one of your Lordships has not only formed, but expressed an opinion, and a very clear opinion, against it. The best way of considering this point is to view it in relation to the *general scope and avowed object* of the proposed examination, rather than as limited merely to this detached question. Our object is to test the credit due to this witness; and therefore, I propose to make him disclose himself, by asking him about his accession to all sorts of crimes of which we may believe that he is conscious of being guilty. Now, I maintain my right to do so on as firm grounds as ever man maintained any proposition. Testimony is never admitted except on the ground that credit is probably due to it. Every objection to competency is merely a guard set to watch the avenues of credibility. And even where the testimony is admitted, the objection to its admissibility is often relaxed, merely because, after it is let in, it is still the right and the duty of the jury to judge of the weight it is to receive. But this check is altogether defeated, where a witness is allowed to give his testimony, and is at the same time permitted to conceal circumstances *within his own knowledge*, which may enable it to be appreciated. It is true that he may be privileged not to answer; but this is no objection to the competency of putting the question; because, in the *first* place, he may *choose* to answer,—and, in the *second* place, which is the common way with an unworthy witness, he may answer, and answer *falsely*, and thus afford the means of getting himself contradicted. This is so plain, that the idea of protecting a villanous witness, by not letting any question about his own iniquities be even put to him,

humbly appears to us to be absolutely monstrous; and I know no authority for it in the law of Scotland. We have no authority indeed, except that of common sense and general principle, either one way or other. But I understand that in England, where they are richer than we are in cases on this subject, and more experienced in the application of the rules of evidence, there could be no discussion on this matter. Indeed, I see a trial reported the other day, where certain persons were accused of a conspiracy, and where the prosecution rested chiefly on the evidence of a person supposed to be of bad character; and I see him expressly asked, "Are you a common prize-fighter? Are you the keeper of a gambling-table?" &c. And not confining themselves to these general questions, they ask him specially the very question that I now propose to put: "Did you ever kill a man?" He answered that he had; and so they go on making him confess, or deny, or evade, the commission of all sorts of iniquities; and the result was, that the judge—either Justice Bailey or Justice Vaughan—tells the jury to acquit, because the principal witness *had proved himself* to be undeserving of much credit. The propriety of this, if it be true that parole testimony is received, because it is justly entitled to belief,—seems to me to be so perfectly evident, that I really cannot argue the question. I cannot fancy any thing more dreadful, than that a witness is to be allowed to give his evidence, and yet is to be protected to this extent, that he is not to be permitted, even if he chooses, to disclose iniquities, in which he may be absolutely steeped; which, were they proved, would deprive his testimony of every claim to credit. We are so confident in our opinion of the legality of the question, that we wish it to be put on the record, in order, that if it be rejected, we may find our remedy where we can.

Mr. Alison.—Whether he is to dispute inquiring into the examination of a witness in this way or not, I apprehend there is no point upon which the law of Scotland and England is more at variance than in the cross-examination, or adducing of the evidence against the witnesses, by which they are to be discredited. We all know, in the law of England, where a pannel has not a list of witnesses served upon him, they are entitled to examine them as to their whole life and conduct; but that is not the case here; not merely on the ground that a witness is entitled to protection from the Court, but that a person is not liable to answer on cross-examination for his whole life and conversation. Hume says, vol. ii, page 341—"Moreover, the pannel shall not much mend his objection, though he drop these general imputations of evil fame, and offer an immediate proof, by testimony, of infamous crimes committed by the witness. The prosecutor must not lose his evidence, but on sure and satis-

factory grounds; and the witness is not to be *made* infamous in this trial, on a summary, unexpected, and *ex parte* inquiry: he must be shown to be already infamous, by his conviction in due course of law, of some crime inferring infamy, after a fair and an open trial. This has been the settled rule of our practice, if not from the earliest times, at least ever since the introduction of a new and more improved order, with the new establishment in 1671."—See also Burnett, 462, who says—" A witness is exempted from giving evidence as to facts which may infer his own infamy,—the rule being, that no one is to be rendered infamous or *disgraced* by his own testimony, though it may collaterally aid the pannel by affecting the competency of the witness. What the law will not allow to be proved by others, it will not permit to be *proved by the witness himself*, especially when, with regard to circumstances that can alone incapacitate *or discredit him*, the law has pointed out the mode, and has at the same time afforded the opportunity, by the previous notice it requires to be given of the witnesses to be adduced of substantiating these in a better way, viz. by producing a *record* of the conviction of the witness."

A witness in England may be interrogated upon any facts tending to discredit or infer suspicion; but with us it only is in the due course of law, after a fair and open trial, with the production of a conviction of some offence by a jury, that will disqualify; but without any conviction being put upon record, it is quite contrary to the law of Scotland; therefore the investigation that is proposed, finds no analogy in the law of England to the analogy contrary to the law of Scotland.

Dean of Faculty.—My Lord Justice-Clerk, I entirely concur with my friend in the earnestness with which we urge the right to put this question to the witness, and propose to enter it upon the record. It will be observed, that the question is put to the witness himself, not with any view of *disqualifying* him as a witness, but solely for the purpose of affecting or trying his *credit:* we are not proposing to bring any other witnesses or proof on the subject of the question, which is the case supposed by Mr. Hume, or bring forward any thing in order to disqualify him as a witness; but we wish to put a question which is plainly calculated to try the credit of the witness. Your Lordship indeed warned him that he was not to be examined upon any other but the present case; that he was not to be examined upon any other charge *against the pannel* but that regarding the death of Margery Campbell or Docherty; and assuredly the prisoner cannot be affected by anything he may say as to any other offence. But this will never lead to the consequence, that the prisoner is not entitled to examine the witness as to his own conduct, so as to shew the jury what reliance may be placed on his veracity and

regard for his oath. Your Lordships also solemnly warned him of the obligation to speak the truth, and the danger to him specially of any departure from it. You did this from the knowledge that he is not in the ordinary circumstances of a witness, but liable to the greatest suspicion. And surely when such a witness is brought against a prisoner, it is but reasonable and plainly necessary to the ends of justice, that he should have full liberty to show the character and credit of the witness, if he can do so by that person's own testimony. We are quite aware that the question is one which the witness may decline to answer: we never meant to say anything to the contrary: but it happens often, with such witnesses, that even though warned of their privilege to decline answering, they choose to answer questions of this kind, and answer them *falsely*; and in the present case, we think it very probable, that this witness will answer the question, and that he will answer it *falsely*. But, in whatever way he may answer it, it involves matter of the highest moment to enable the jury to estimate his credit. If he answers it affirmatively (which we believe he must if he speaks *truly*), the fact will speak for itself. If he answers in the *negative*, it will be *false* evidence upon his oath, and the law affords remedies independent of the effect in this trial. If he declines to answer the question, we are aware that we can only leave it to the jury to draw their own inference.

Lord Justice-Clerk.—You have heard the objection to the competency of this question, we all know the course the Court follows in such a case, which is, to tell the witness not to answer the question unless he thinks proper.

Lord Meadowbank.—I regret having stated the impression made upon my mind by the bare announcement of the question proposed to be put to the witness, because I should most assuredly have rather, in a matter of this vast importance, desired to obtain every light that could have been thrown upon it before I ventured to deliver my judgment regarding it. But perhaps my having done so, was only the effect of my attention being more anxiously called to every word that dropt from my brethren at the bar; and if I had been satisfied that any thing that was suggested by them ought to have had the effect of shaking the opinion which occurred to me at first, nothing that I stated before could (I trust it is unnecessary for me to assure your Lordships) have prevented my honestly and frankly avowing it. I have, however, been confirmed in that opinion, by finding, that notwithstanding all the ingenuity of my learned brethren, they have said so little on the subject, and that they have been unable to shew one single precedent in favour of their argument, except that which has been obtained from the law of

England. Now, I for one must throw the law of England altogether out of the question. It is, I believe, in matters of this kind, diametrically opposite to ours. That law, for instance, holds, I believe, that a witness has no protection from having been examined on a criminal trial. We hold that he has. It is quite absurd, therefore, to dream of drawing a precedent, which is to guide your Lordships, from the law of England. But even our law goes no farther than to protect witnesses from being subject to prosecution on account of matter immediately and inevitably connected with the subject of the trial in the course of which they are examined. I understand it, therefore, to be admitted that, if the question proposed were entertained by your Lordships, the witness must be told that he is not bound to answer it, because it is beyond the competency of this Court to afford him protection against being afterwards questioned for the perpetration of crimes which do not form the proper subject of inquiry in the present investigation.

But I have always understood that the law of Scotland has always gone a great deal farther—that it allows no question to be put which a witness may not competently answer; and which, if answered, must not be sent to the jury as a matter of evidence.

Now, in the first place, I admit that it is quite competent for the prisoner to put any questions, provided they be directly relative to the matters at issue, by which he apprehends that the credibility of the witnesses for the crown may, if answered, by possibility be shaken. There, however, I apprehend the right to stop. The oath taken by the witness binds him to speak the truth, and the whole truth; but that obligation goes no farther than it refers to the matter before the Court. It neither does, nor has it ever been held, to bind him to speak to matters relative to which he has not been called legally to give evidence. I apprehend, therefore, that even the oath which has been imposed upon the witness, is not obligatory upon him to speak to matters *not immediately* connected with the subject of this trial—and, in fact, such was the opinion of the counsel for the prisoners; for, upon their application, the witness was particularly warned that he was only required to speak the truth, and the whole truth, relative to the third charge in this indictment. I have always understood, however, that no question could be put, upon cross-examination, to a witness in this country, which would, if answered, have the effect of rendering him in truth, inadmissible; or what is in effect the same thing, a witness whose evidence could not even be sent to the jury for their consideration. All questions having that effect, must be put as preliminary, and at that period when the questions asked of all witnesses by your Lordships before the examination commences. In that respect, very likely, we differ

from the law of England; but for the reasons assigned by Mr. Hume in the passage read by Mr. Alison, I am not inclined to think that the rules of our law are here inferior, or less effectual for the administration of justice. The object of our law has always been to get at the truth, and I suspect that is best to be obtained by preventing witnesses being harassed in the way that would result from such questions as the present being held to be admissible.

But further still, suppose, in the second place, that the witness answers the question that has been put, and in the affirmative, and depones that he has been present at more murders than the one in question, what is to be the result? Is the Lord Advocate, upon the re-examination, to ask him at what murders he has been present, and who was concerned in those murders: or to go into an examination of all the matters connected with those cases? If he is, we may be involved in an inquiry into the circumstances connected with the other murders in this indictment, which are not now the subject of this trial, and which your Lordships, by your interlocutor, have precluded from being the subject of trial at present, and before this jury. I cannot think that such can be your Lordships' intentions; yet the Court must be prepared either to go this length or not, before allowing a question to be put which must open up such a field of inquiry; for if the prisoner is entitled to put the one question, it must follow that the prosecutor is entitled to put the other; and if you do permit such an inquiry, you must be prepared to send the answers so given, and the evidence so arising, to the jury for their consideration. And what would be the consequence? By the evidence thence arising, and the suspicions thence created, the prisoners might be convicted upon matters not at issue in this indictment. Nor is it enough to say that this has been occasioned by the prisoner himself; for the law of this country interposes to protect a prisoner from his own mistakes—it lays down rules by which, in all cases, protection shall be afforded against either accident or error; and such a rule, I apprehend, we have, by which such a question as the present is rendered inadmissible. In short, I conceive it would be highly erroneous to send such answers to a jury; and as I am clear we are not entitled to permit any questions to be put, the answers to which must not be sent to the jury, I think this question cannot be admitted. But I set out with saying that I do not think any question can be sustained by your Lordships, which, if answered in the affirmative, would disqualify a witness. Now, such questions as this, it appears to me, are of this nature. For thus, suppose that the question put were, Have you committed ten acts of perjury—and the answer were in the affirmative, what is to be

the result? Your Lordship must tell the jury either that the witness's answer is true, or that it is false. If true, must it not also be added, that he cannot be believed upon his oath; and that, if it appears not to be true, then he is equally incredible. By admitting such questions, therefore, the necessary result is, that you put it in the power of the witness to disqualify himself; and that, I have invariably understood, I can solemnly assure your Lordships, to have been a principle reprobated by the law of this country.

Lord MACKENZIE.—I incline to a different opinion, nor am I surprised that in a case which appears of so unusual a nature, differences of opinion on some points should occur. I agree in the first place, that the witness has no protection beyond the case in which he has been called as a witness. I have no idea, that by confessing, either ultroneously or on his examination or cross-examination, other crimes than those in reference to which he has been brought forward to give evidence by the public prosecutor, he could acquire any right to impunity for those crimes, or even security that his own words might not be used in evidence for his conviction of those crimes. But then, in the second place, it does not appear to me that the want of protection is a sufficient legal ground for refusing to allow a question of this kind to be put to a witness, though I think it is a good reason for his being carefully warned by the Court that he is not bound to answer the question so as to criminate himself, and that if he shall answer it, he has no protection. I understand that to be the general course of our law when questions are put to a witness that may tend to criminate him. The protection acquired by witnesses called by the public prosecutor puts them in a different situation. But this course applies to witnesses for pannels, and it rather appears applicable even to witnesses for private prosecutors in criminal cases. I do not think therefore that the danger of the witness criminating himself requires the exclusion of the question, provided he is properly warned. But it is said, on the authority of Mr. Hume, that a witness ought not summarily to be put upon his trial for his character. I do not dispute that authority, but I think it not applicable to an examination by questions which are put only to the witness himself, and which he may decline to answer. That is quite a different thing from bringing forward other witnesses without notice, to prove guilt against any one witness, and destroy his character, which seems to be what Mr. Hume considers objectionable. What is attempted here, seems to be to examine a witness himself respecting his own character, which I have never considered to be generally incompetent. It is argued, that he may in this way disqualify himself, by falsely imputing infamous crimes to himself. He could not however make himself an incompetent witness by such imputation, for it requires

conviction to create legal infamy to that effect. Nor is it likely that witnesses will run the risk of accusing themselves of crimes without protection, which at any rate they can do falsely, only by perjury, and that of a nature by no means incapable of detection and punishment. I am therefore of opinion that the question may be put when your Lordship has fully warned the witness in regard to his danger, and right to decline answering.

Lord Justice-Clerk.—I have given my opinion. I do not mean to rest my opinion however upon the law of England, till it is fixed upon us by the legislature. We cannot adopt opinions and principles which are totally foreign to the law of Scotland. This question is to try the credit of this witness, who is brought forward as a *socius criminis* in regard to the highest crime known in the law of Scotland. Though I think with my brother on my right hand, that it affects this witness, yet this is an extraordinary case; and in very extraordinary cases we must make allowances for extraordinary questions being put. Now, the point in controversy is, Whether or not, under the assurance that this man will receive, that the proposed question is one in which he is in no respect bound to answer, and that he is entitled to give no answer whatever to it, this question may be put to the witness. The principle is clear, that he is not bound to criminate himself; and if he should answer it, he is in no respect under the protection of the Court. With that positive warning, which I shall feel it my duty to give, I really must own, notwithstanding all the attention I have paid to the argument, I do not deem myself warranted to take such a view of this question as my brother on my right hand. I am as confident of this as I can be of any thing, that in cases under my own observation in this Court, and on the circuit, similar questions have been put to witnesses, and I have struck in immediately by saying—"*you are not bound to answer them.*" I think in those cases the witnesses have uniformly availed themselves of the warning given, and declined to answer the question; and if this witness does so avail himself, it cannot affect his credibility, when we told him in the outset to-day, that it was only to this case he was to speak, and to no other; and that nothing he said in this particular case could have any effect against him. He must be warned to the fullest extent. He must be cautioned that he *may* not answer the question; but if he does answer it, to the effect of injuring himself, the consequences will be for consideration in addressing the jury.

Lord Advocate.—I do not wish to give a second reply. This witness shall be well warned that he is not bound to speak. You shall speak to the murder of the old woman. Now, this question is put to him only in order to do away with this man's credibility. If the question is put, Did you commit that murder? *I must*

show the jury that that objection to credibility does not apply to him, if that excludes from this question in the other matter.

Mr. Cockburn.—What he says as to his connexion with this prisoner, or any other that he chooses to select; if he chooses to select these persons as his accomplices, he can do so:—we have no objections.

Lord Justice-Clerk.—In the first place, my view of this matter is, that he is not bound to answer any question, except as to the murder of this woman; and then, after you have sealed his mouth, ask—What were the other murders? The pannel must deal fairly with the witness, and not mislead by any embarrassment; because, with regard to what has passed in the early part of this proceeding, we must say, you are not bound to answer this question.

Mr. Cockburn.—We are entitled to put this question, and the Lord Advocate may put any other question that he pleases.

Lord Meadowbank.—Is it to be understood, in consequence of the interrogatories put to the witness, that it is competent to enter into the investigation of every other specified murder?

Mr. Cockburn.—I mean to say that he can object to the questions. The Lord Advocate may object to those questions on which the pannels are not upon their trial, and any other that I may think proper to put to them.

Lord Justice-Clerk.—You do not wish to go into another investigation, do you?

Mr. Cockburn.—As to going into the other matter, the Lord Advocate may put any question he may think proper, with regard to the murder of the other individuals, which rests upon the testimony of this man. I will put the questions that I think proper; but I will warn him not to answer them, in consequence of what your Lordship has done.

The following interlocutor was then pronounced:

"After the examination in chief of this witness had been concluded, upon the cross-examination, the counsel for the pannels proposed to ask the witness, "Whether he had ever been guilty of, or concerned in, any other murder?"

"*Objected*, That by the law of Scotland it is incompetent to attempt to discredit a witness by investigating his previous life or actions, or in any other mode but by an extracted conviction for an offence.

"The Lords find that the question may be put, but that the witness must be warned by the Court that he is not bound to answer any such question to criminate himself in such matter."

(Hare was then recalled.)

Cross-examined by Mr. Cockburn.—Hare; you mentioned

when last here, that you were concerned in supplying the medical lecturers with subjects. Did you assist in taking the body of the old woman to Surgeon Square? Yes.

Were you ever concerned in carrying any other body to any surgeon? I never was concerned about any but the one that I mentioned.

Now, were you concerned in furnishing that one? No, but I saw them doing it.

Lord JUSTICE-CLERK.—It is now my duty to state to you, in reference to a question in writing, to be put to you, that you are not bound to make any answer to it so as to criminate yourself in regard to the answer of it. If you do answer it, and if you criminate yourself, you are not under the protection of the court. If you have been concerned in raising dead bodies, it is illegal; and you are not bound to answer that question.

Mr. COCKBURN.—Hare, I am going to put a very few questions to you, and you need not answer them unless you please—you are entitled to refuse to answer them.

Now, Hare, you told me a little ago that you had been concerned in furnishing one subject to the doctors, and you had seen them doing it—How often have you seen them doing it? *(here the witness paused a little)* Do you decline answering that question? Yes.

Now, sir, I am going to ask this question, which you need not answer unless you please—Was this of the old woman, the first murder that you have been concerned in? *(another pause)* Do you choose to answer or not to answer? Not to answer.

I am going to ask another question, which you need not answer unless you like—Was there murder committed in your house in the last October? *(another pause)* Do you choose to answer that or not? Not answer that.

You mentioned, sir, that Burke came and told you that he had got a *shot* for the doctors, and that you understood that that meant that he intended to murder that woman or somebody? That was his meaning.

That was understood his meaning? Yes.

How did you understand that,—was that a common phrase amongst you? Amongst him.

Not amongst him, but you—Had you ever heard that phrase used by Burke before? Yes.

Frequently? Not often.

You understood by that, that he was going to murder somebody? He said this many a time when he had no thought of murdering.

Then how did you understand that he was going to murder? He told me.

Did he tell you who he meant to murder? Yes.

He told you so? Yes.

Now, sir, tell us when it was that he told you that he meant to murder that old woman? In the fore-part of the day.

On Friday? Yes; eleven or twelve o'clock I think.

Now, you were dancing after this in Conway's house? Yes, and so were all the rest.

You were dancing in Conway's that night? Yes.

Was that old woman there at the time? Yes.

You told us when you were examined last, that you did not expect any mischief that night? I had no notion of it.

And yet you told us that he told you: Had you no notion of it at that time when you was in Conway's? Yes.

When you was in Conway's, you had no notion that there was to be any mischief in Conway's? No

Had you any notion there was to be any mischief that night? From his words.

Had you any notion that there would be mischief that would happen that night? I had no notion but only from his words.

Pray, sir, when you was in Conway's, had you any notion that mischief would happen that night? Only from his speech.

He told you that he was to murder this woman. You were dancing in Conway's that night; did you suspect that mischief would be done that night? Only from his words.

When was it that you anticipated mischief that night? When he was on the top of her.

Was that the first time that you formed a suspicion that he was to do mischief that night? Yes.

Were you perfectly easy in your mind that he was not going to murder her? At the time that him and I fell out, I had no notion till he fell on her.

Do you remember of your seeing this body in the police-office along with Lieutenants Paterson and Fisher? Yes.

Were you asked if you had seen that body before? *(This question was hinted at as objectionable by Lord Meadowbank.)*

Mr. Cockburn.—Every discussion of evidence on legal principle ought to be avoided, if possible. I was going to propose to put a question, and we shall hear whether it is objected to. Let the witness withdraw. *(The witness was removed.)* If it is objected to, the right way is to get quit of it. I propose to put this question—I dare say I need not tell your Lordship we refer to Fisher of the police-office, who said that Hare and his wife denied that they ever saw it. The question is, Had he admitted that he ever denied having seen that body?

Lord Justice-Clerk.—It is a fair question. *(The witness was again brought into Court.)*

Mr. Cockburn.—Hare, you saw this old woman's dead body

in the police-office? I saw a body in it: I could not say whether it was it or not.

Was it the old woman's body or not? I could not say.

Do you recollect of saying about five minutes ago it *was* the old woman's body? The voice of the folk said that it was.

Now, did you admit that you knew that body or not? I denied it.

Did you admit having seen that body alive or dead; or did you deny it? I could not say whether or not.

How soon was it after her death that you saw her in the police-office; was it on the Saturday, Sunday, or Monday, or when? On the Sabbath-day that I saw the body in the police-office.

Do you recollect whether you was asked if you had seen that body or not, or if you knew who it was? I am sure I could not say.

Do you recollect of denying you knew any thing about that body? Yes, I recollect that.

You have been acquainted with Burke for some time I understand? Yes.

You are not bound to answer this question I am going to put, unless you like. Had you had several transactions with Dr. Knox or his assistants and Burke? Do you choose to answer that? No.

Had you received money at various times from Dr. Knox? I never did.

Had you received any money from gentlemen representing themselves as Dr. Knox's assistants? They never gave it to me.

Did you ever receive any money from Dr. Knox's assistan Burke might have had it paid to him by Dr. Knox, and he could have given it to me.

I ask you, Did you never receive money from Dr. Knox's assistants? No.

Who was it that received the money for this old woman's body at Newington? Burke.

How much? Five pounds.

And you were to get other £5 on Monday?—Did you not say that there was to be £5 paid to Burke at some other time? Was it £5? Yes.

Are you positive that it was to be paid—Was it £3 or £8—Or do you know any thing about it? Yes.

Who said that? Dr. Knox's man.

What was it that he paid to him, do you know? It was £5 he gave to William Burke, £4 in notes, and £1 in silver.

That was all that he gave, was it? Yes.

Which of them paid the porter M'Culloch, was it Dr Knox's assistant? It was Burke.

Are you positive? They were all three sitting on the other side of the table, the doctor's man, Burke, and the porter.

Who paid him? I could not say.

You told us some time ago that you were positive. Was there £4 paid in notes and £1 in silver? Yes, and it was Burke that paid me; he threw two notes across the table, and the rest of it was change.

Now, sir, attend to this. You say Burke was paid all the £5; that Burke afterwards gave you part of it—Are you certain that Paterson did not divide it between you? He laid it down on the table; Burke lifted up his half, and he shoved the other over to me.

Are you positive that Paterson did not pay you? Yes.

Did Paterson, when he gave him the money, divide it into two parcels? He put the two pounds together, and Burke counted the silver. Paterson put four notes separate, two and two: and he halved the silver; and some of the two, I do not know which of the two, paid the porter; and Burke shoved my share over the table.

Pray, sir, had you had many quarrels or disputes with Burke about these payments? No, I never had any.

Hare.—What payments?

Mr. Cockburn.—Payments received from Dr. Knox or his assistants.

Hare.—No, not about that matter.

Mr. Cockburn.—Had you ever any quarrels with Burke about money matters at all? None.

Well, I think you told us, Hare, that the old woman went out to the passage and called out murder or police? She was crying one or other of these. I can't say which.

You pushed her over a stool you say? After that, she was leaning on her elbow and sitting on her backside.

Was it before or after this that she went into the passage? It was before this.

Was it a minute or two? It was just a little before it; I could not say.

And was brought back by M'Dougal you say? Yes.

Well, you say that when Burke destroyed her she cried a little and moaned—Was that like the moan of a person suffocating, the time he got on her? Yes; I thought she gave a great shout like a person choking. It was like a person strangling.

You could have heard it a good way off? No, sir.

About the time that that sound was, was there any person calling out for the police, or murder? I did not hear any at that time.

Had you and Burke been fighting before this screech? Yes.

Were you fighting after that screech? No, not after.

Were you fighting during the time of the screech? No.

Were you fighting at the time that that screech was going on? No.

And were you not fighting after that? No.

Then all your fighting was before that screech? Yes.

I think you have told us that this man Brogan and the two women had been in bed in the morning, and that you and the other man, Burke, was not? Yes.

Where was Brogan lying in the morning? Brogan was lying next the wall in the morning.

Where was you lying? I was sitting in the chair with my head upon the bed.

Where was the other man? He was sitting at the fire.

Did you see Brogan come in? I did not.

Now, sir, when Burke was on the top of this person destroying her, where were you? I was sitting on the chair in the same room.

How long was he dealing with her? I could not say how long.

How long? About ten minutes.

And did you sit in the chair? Yes.

And did you sit ten minutes on that chair without stirring one hand to help her? Yes.

The women went out to the passage? Yes.

Did you go out? No.

Were the women during part of that time in the bed with the rug over them, before they went out into the passage? I could not say whether their heads were covered with the rug or not.

You did not cover your head? No.

You stood and saw it with your own eyes? Yes.

You did not call murder or police? No.

Not a word? No.

Did you go to the police next day and give information? No.

You did not do that, but you took the body to Surgeon Square? The porter did.

You followed him? Yes.

And you took money for it? Part.

And next day, in the police-office, you denied that you knew any thing about it? Yes.

Were you examined in the police-office on oath? No.

Lord MEADOWBANK.—You were examined in the police-office as a prisoner? Yes.

That was the position you were examined in? Yes.

And it was under that charge you were called on to say whether you knew the body or not? Yes. *(Witness was removed from Court in custody of a Macer.)*

Mrs. HARE, *sworn by* Lord Meadowbank.

Lord Meadowbank.—Margaret Laird or Hare, we see from the list of witnesses, that you are a prisoner in the tolbooth of Edinburgh, and we understand that you are implicated in a charge of the crime of murder, for the murdering of an old woman of the name of Docherty, Campbell, or M'Gonegal. It is my duty to tell you, that for any thing connected with that murder, you can never be brought to trial if you speak the truth. You are brought here as a witness, and that is your protection; but your being brought here as a witness, and bound to speak the truth, and the whole truth, and nothing but the truth, the Court requires that you shall do so; and that you are bound to speak nothing but that to which you are sworn to speak; not to the other murders; and you may rest assured, that if you deviate in any particular from the truth, most unquestionably you will be detected, and the most severe and exemplary punishment will follow, and from where you now stand, you will undergo that punishment which the Court, for the administration of justice, finds it necessary to employ.

Interrogated by the Lord Advocate.—You are the wife of William Hare, the man that was here just now? Yes.

And you live at Portsburgh? Yes, sir.

You remember last Hallowe'en night? Yes, sir.

Did any strangers sleep in your house that night? Yes.

Is Gray the name of the man? Yes.

Did he and his wife sleep in your house that night? Yes.

How did that happen; did they lodge in your house? No, they were stopping in Burke's house. Burke asked me to give them a bed that night.

For one night, or more? Just for one night.

What time of day was this, do you remember? I could not say; it was in the course of the day.

Was it in the early part of the day, Mrs. Hare, was it before dinner? I do not remember, sir.

Was it day-light? Yes, sir, I am quite sure it was day-light, so far as I remember.

Well, then, say what you remember; neither more nor less than what you recollect. Did you go out that night in search of your husband? Yes, sir, I did.

About what time of night was it? Between 8 and 9 o'clock.

Where did you find him? I found him in John Connoway's.

And who was in Connoway's at the same time? Connoway and his wife, William Hare and me, and Burke and his wife.

Was Burke there? I do not recollect whether Burke came or not.

Was M'Dougal there? Yes, she was.

Had you drink there? Yes, spirits.

Had you a great deal of spirits? I could not say.

Were they all affected with liquor? Not much.

The old woman was in Burke's? Yes.

Did you not see her in Mrs. Connoway's? Not that I recollect.

Did you stay long with them? I stopped there till my husband rose and I asked him to come home, and he said he would come home after a little.

Did you go into Burke's house? Yes.

Hare and M'Dougal and you? Yes.

Did Burke come in there? Yes.

Did you see an old woman there? Yes.

Was she there when you came in and went out? Yes.

Was there a quarrel betwixt Burke and your husband that night? Yes.

Was there a fight? Yes.

Did you try to separate them? Yes, I went in between them; I separated them.

Did they fall a-fighting again? Yes; and the old woman cried out murder. She went out to the passage, and came back again, and fell backwards: she got a push, and fell down upon the ground; but I do not know who gave her the push.

Now, what more did you see? I saw Burke lying on the top of her, whether on her mouth or on her breast I could not say.

Did she make a noise? I could not say; for Mrs. M'Dougal and me flew out of the house, and did not stop in it.

You went into the passage, in short? Yes.

And you remained there some time? Yes.

Did you cry out? No, sir, I was quite powerless; and neither her nor me cried out.

How long did you stay in this passage? I could not exactly say, sir.

A quarter of an hour? I dare say it would be that, sir.

Now, when you came back again, did you see the old woman? No, sir.

Seeing nothing of her, what did you suppose? I had a supposition that she had been murdered. *I have seen such tricks before.*

Was that your supposition? Yes.

And you asked no questions? No.

Did M'Dougal ask any questions? No, she did not.

Did you lie down on the bed? I do not recollect.

Where were you at the time that Burke laid himself down upon the woman? I was standing betwixt the door and the bed.

I thought formerly I was lying down, but I think now that I was not.

Were you close to the door? Yes.

Was that close to the bed? Yes.

There was very little room betwixt the door and the bed? Yes; very little, Sir.

Lord Justice-Clerk.—The woman had fallen down, and Burke had laid himself upon her. How long might he have remained upon her before you left the room? Not many minutes; whenever I noticed her I ran out of the door.

Where was M'Dougal? you say you was close to the bed, where was she? I cannot say exactly whether she was standing near me. I flew out of the house at the time.

Were you the worse of drink at that time? No, Sir; I was not; I had a glass, but I was not the worse of it.

Who went out first? It was I, Sir.

Were you alarmed at this sight? Yes Sir; we were both alarmed, and we both flew out of the house.

What did you see Burke do? I did not see him do any thing; but saw him lay down himself upon her breast.

Where was your husband at the time? Near the dresser.

You say you suspected: had you any particular reasons to suspect that mischief? Did M'Dougal speak to you about that? Yes; in the afternoon.

On Hallowe'en day? Yes; in the course of the afternoon.

Did M'Dougal come to your own house? Yes.

What did she say? She said there was a *shot* in the house; that was the very word that she used.

Did she say any more about the shot? No, Sir; she did not.

Did she mention about a woman? No.

Did she say any thing about her husband? Yes, Sir; she mentioned he had fetched her in out of some shop.

How did you know that she was a woman? She told me that it was a woman.

At the same time that she mentioned about the shot? Yes.

Now, did she say expressly that they meant to make away with this woman? No.

Did you understand it in the house, that that was the person meant to be made away with? Yes Sir, I did.

Did she say any thing about what was to be done with the woman that night? No Sir, she did not.

You said your reason was in understanding the word *shot*, you had heard that word expressed on former occasions with that meaning,—the meaning of murdering a person, or making away with them? Yes.

Was there any thing passed about giving the woman drink that night? No.

They gave her drink when you was there? Yes; they gave her some drink.

Were they pressing drink upon her that you saw? No; they were not, that I saw.

Was the woman affected with drink at the time you saw her? Yes; she was rather the worse of drink.

Well, you remained there all night? Yes. We stopt there till between four and five o'clock *(next morning.)*

Did Mr Paterson come in? Yes.

Did Burke and he come in together? Yes; the one shortly after the other.

And you staid in that house all night? Yes; I had been lying asleep.

At the time that Mr Paterson came in? Yes.

You did not hear what he said, or any body else said? No.

Was any body else in bed with you at that time? No.

Do you know where the body had been put on that night? No; but from what I heard next day, it was lying under the bed.

Do you know that it was removed away? Yes.

Was there a box got for it? Yes.

Did you carry the box? Burke asked me to get a box to him for holding old shoes. We went to Rymer's shop; Burke got a box, and M'Culloch the porter took it away.

You know the body was put into that box? Yes.

Did you follow your husband and Burke at the time that it went away? Not at that time; we found them after in the Cowgate.

What did you follow them for? To prevent them from fighting, in case they might be drunk.

Where did you go? We went to Newington, and then came home again.

What answer did you make to her when she spoke about the *shot?* Nothing that I recollect of. I gave her no answer that I recollect.

Did you not dissuade her from these things? I neither said one thing or another, that I mind.

Did you and M'Dougal ever talk of this matter afterwards? Not that I recollect.

In your way to Newington? No; I do not recollect of saying any thing about it. I have a very bad memory.

And did M'Dougal ever express any regret that this woman had been killed in this way? None Sir, that I heard.

What passed betwixt you and her when you were in this

passage, about a quarter of an hour? We had a few words; but I do not recollect what passed.

Was it just staying there till the thing would be ever? We were just speaking something concerning the woman; but I do not recollect what it was.

Though you do not recollect the words, you may remember the import of it? Yes, Sir.

And what do you think you was saying about her? We were just talking about her, saying, perhaps it would be the same case with her and I.

Lord Meadowbank.—Is that to say that you might be murdered; is that what you mean? Yes, Sir.

You know that Mrs Connoway lived next door there, and you know that there was a Mrs Law lived on the opposite side of the passage, did you not think of going there? I dreaded to go there, as I had left my husband three times. The thing had happened two or three times before, and it was not likely I should tell a thing to affect my husband.

I thought you said you left your house three times altogether? I left it for to go away altogether; for I was not contented to stay,—not leading a contented life.

Lord Justice-Clerk.—You mentioned that the old woman did go to the door to the passage before she fell down; she went forward to the door,—like as out of the door into the passage? No; She did not go out of the door at all,—there are two doors, and she went to the first door, just entering it.

That is the door of the room? Yes, Sir.

Did she come back of herself, or did any body bring her? She came back of herself.

And it was after she so came back that she fell down? Yes; I rather think she got a push.

After falling down, did she remain long in that position where she fell? I could not say, Sir; I left the house.

Did Burke fall on her immediately on her falling down? Yes, immediately on my leaving the house.

You say she got a push and fell down; was it very soon after that, that Burke fell upon her? Yes, very soon after that.

Would you be so good as tell us,—I should like to know from you what was he doing to her at the time you ran out? I could not say what he was doing to her, he was just lying upon her breast and on her mouth.

Did she give any scream to alarm you? She cried murder.

What time did she cry murder? At the time that Hare and him were quarrelling.

But at the time that Burke lay upon her breast or mouth,

did she give any groan? The woman was not saying any thing or calling out. I was afraid to see any thing would come upon the woman.

LORD ADVOCATE.—Afraid to see her murdered, is that what you mean? Yes, Sir.

LORD MEADOWBANK.—Now, when you saw this, was your fear occasioned or created by what had passed between you and the woman in the fore part of the day, when you talked of a '*shot*;' was your fear created by what this woman Macdougal told you of a '*shot*,' by which you understood this woman was to be murdered? No, I passed no thought of it at the time.

You went there that night, and found the old woman in the house; now, upon the oath that you have taken, did you or did you not expect that night, that that old woman was to be murdered? No, I did not, Sir.

Will you tell me this,—why did you think the old woman was kept in the house by Burke, then,—she was a beggar woman? Why, I cannot swear what he was keeping her in the house for; I had no idea, Sir; I just came round to spend the night of Hallowe'en, and I made a remark, that I did not wish to leave my own house that night.

Cross-examined by the DEAN of FACULTY.—You say that the woman got a push; who gave her that push? I could not say which of them, I could not say whether it was Hare or Burke, that pushed her; I could not say, they were fighting *through* the floor.

Was she ever from the ground after she was pushed down? I did not stop to see.

Now, was it instantly when she was pushed down that he got above her? Yes, Sir.

There is a door at the outer end of the passage, is there not? Yes.

How is it fastened? With a latch, or a natchet.

In the inside? I do not recollect, I never paid any attention to it.

When you was in the passage, did any person knock upon that door? None that I heard, Sir.

When you were in the passage, did you hear the old woman cry? No, Sir, I did not.

Did you hear her make any noise? No, Sir.

You heard her make no noise? No, Sir.

You say you was very much alarmed when you went into the passage—why did you not go out? I had no power to go out.

You did not say any thing when you came into the room? No, Sir.

Not a word? No.

Did Hare say any thing? No, Sir.

Where was he when you came into the room? They were both standing in the house—either standing or sitting—I could not say which.

Well, after you came in again, you went to bed? I just came in and went to bed—I was not sleeping.

Did you fall asleep? Yes; afterwards I fell into a *doze*.

Was there a man Brogan that came in? Yes.

Did he go to bed at all? We had a dram after Brogan came in,—they had not a bed in their house but one.

Who had the dram? Burke and M'Dougal, and Hare and him. I do not know whether they drank it all or not, but we had a dram.

Well, there was but one bed; did you come out of the bed when you was getting the dram? Yes.

What did you do? I rose out of bed when Paterson went out.

Well, did you go into bed again? No, Sir.

Was M'Dougal in bed? No, Sir.

Was Brogan in bed? No, Sir; Brogan, M'Dougal, and *me*, lay down on the floor.

Was Hare in bed? Burke and he fell to fighting again.

Did they fall a-fighting again? Yes.

Well, what happened on that second fight? Burke lifted up a stick to strike Hare, and M'Dougal took it out of his hand.

You did not see the old woman get off the ground after she fell? No Sir.

Did you see her try to get up? No, Sir, I did not.

You told us that you found your husband in Connoway's, and you staid some little time there; how long might you be in Connoway's? I could not say, Sir.

And then you went into Burke's, and there were yourself, and Hare, and the old woman; was the old woman in Connoway's? No; not that I recollect.

Well, you and your husband, and the old woman, was there in Burke's? Yes.

Was Burke not in when you went in there? I am not sure.

Did he go in a little after? I do not recollect whether he was in, or whether he came in or not; I have a very bad memory.

Lord Meadowbank.—You had a bed in your house; how did it happen, after all this transaction, you did not go home to

your own house? I was trying to take my husband along with me. I did all I could Sir, but I could not get him.

Mr BLACK, Surgeon.—Sworn by Lord Mackenzie.

Interrogated by Mr Wood.—Were you shewn the body of a woman in the Police Office on the 2d November last? Yes.

You examined the body particularly? Yes I did, externally.

Will you state to the Jury what you observed about it,—what appearance it had, externally? I did not observe any marks or blemishes about her body whatever, of any consequence.

Any wounds? None of any consequence.

Was there any blood about any part of her person or face? There was some blood about her nose.

Any thing else? There was some blood about her nose, and there was saliva.

Where did the blood appear to come from? The blood that I saw in the Police Office was of no consequence, it had not proceeded from any wound or cut.

What appearance had the face? Much swollen.

Any thing remarkable about the eyes? They were much swollen too, and the face of a blackish hue.

Did you form any opinion on it, from what you saw, whether the death was occasioned by violence? My own private opinion was, that she had died by violence; but, medically, I could give no opinion, quite certain, of the cause of death.

And the appearances you observed, and which you have already stated to the Jury, were such as might have arisen from the death being caused by suffocation? That is my opinion. I beg to observe, that in many cases, it is very difficult to form any opinion with regard to suffocation; and that I really and truly believe, still, in a medical point of view, that it is dangerous to hazard that opinion.

What was your opinion, at the time that you examined the body in the Police Office? That was my opinion at that time. My opinion was, that the woman died a violent death, by suffocation.

Lord Justice-Clerk.—I suppose you mean to add, that you cannot be quite positive, but that is your conclusion? Yes.

Cross-examined by the Dean of Faculty.—Have you any *degree*? No, merely a *surgeon* for the Police.

Lord Justice-Clerk.—For any considerable length of time? between 19 and 20 years.

Dean of Faculty.—When you say that your private opinion was, that this woman must have died of violence,

did that partly arise from the circumstances that came before you in the Police Office? I beg to observe to you, that on the night of Saturday, when a person gave information to the Police, of a person having been murdered at the West Port, I went there with the officers of Police, and we found a quantity of blood, mixed with about 15 or 16 ounces of saliva; and having been told that the woman had lain in that place, I concluded that that saliva must have come from her mouth and nose.

I want to know, apart from these circumstances, whether you formed any medical opinion apart from this? From all the circumstances of the case combined, I am of opinion that she came by a violent death.

But from the appearances of the body? I did at the time.

Had you given any medical opinion? From what I saw of the body, I declined to hazard an opinion.

Lord Justice-Clerk.—I was going to ask you, have you had any opportunities of seeing the fact, of persons strangled or suffocated? I have seen them several times.

Many? I could say many.

Now, the question is, were those appearances you describe on this dead body, the same as these? Exactly the same.

And the appearances you saw upon the body, corresponded with those you have seen on those other dead bodies? Yes.

Cross-examined by the Dean of Faculty.—Were these instances, strangling or suffocation? Suffocation—probably both.

In what manner? Probably putting soft substances on the mouth,—pressing the lungs,—and pressing the chest.

Where did you see many instances of that? I have seen cases in the Police Office, of persons brought in in that way.

Cross-examined by Mr Cockburn.—Have you ever seen a case of suffocation separate from strangling? I have known many cases of drink, of people lying on the street, brought in in that way.

Were the appearances the same? Very similar, as in this old woman.

Have you had much experience in cases of persons that you knew were suffocated? I cannot say that, except from drink.

What do you mean, when you talk of cases coming to the Police Office, as cases of suffocation,—were they all from drink? Yes, I have known six cases in one night. It was in November last, and we did not know which to apply to first.

From drinking? From drinking.

Have you known no case of mere suffocation apart from drinking? None.

Were the symptoms here like those you have seen in suffocation from drinking? Yes.

Were the appearances of this woman's body like those you have seen in many cases that night? Yes.

Were the appearances on these persons like these you saw on the body of this old woman? They had a resemblance.

Now, if you had seen this corpse, this old woman's body, and had known nothing whatever of the other circumstances in the case, and just put before you without any other: Take this view of the case, suppose you had never seen the house, and never heard a word spoke about it, but that woman's body laid down in the like enumerated circumstances, could you say that it was or was not suffocation from drinking? I must say, that in a number of those cases, they had all the appearance; very much swollen and black.

Were the eyes swollen? Yes, and in a measure started from the sockets.

That is what we commonly call a good deal started from their sockets? They were.

Lord Advocate.—In cases of suffocation from drink, did you ever observe blood and saliva as you observed here? No, unless they sustained some injury, from a person falling, or so.

Suppose you had found this body lying contiguous to the house,—what opinion would you have formed? I would have thought the person had died from suffocation.

You would have had no doubt of it then, would you? No.

You would not have considered that proceeding from intoxication, but from other violent death? Yes.

Lord Mackenzie.—In cases of suffocation from drink, do you mean to say that the person should be drunk, and fall upon the face, and be suffocated? Yes.

Dr CHRISTISON.—*Sworn by* Lord Mackenzie.

Interrogated by the Lord Advocate.—You examined a body shewn to you by Fisher in the Police Office? I did, along with Mr Newbigging.

Where was it you examined it? In the Police Office, minutely, on Sunday the 2d November, and on Monday the 3d.

Do you recollect the appearance? The external appearances in the first place, were several contusions on the external parts of the body; and, in the second place, a fluidity of the blood internally. The external appearances first noticed were contusions on both legs; and on subsequent examination, we found one on the left loin, another larger on the left

shoulder blade; another small one upon the inside of the upper lip, and two upon the head.

What part? One upon the back part of the left side of the head, and the other on the fore part of the right side.

What were the other appearances? Pale lividity of the features generally, and dark lividity of the lips;—great redness and vascularity of the whites of the eyes;—an unusual want of lividity, I may say a total want of lividity, upon every other part of the body but the face;—ruffling of the scarf-skin under the chin.

Where is that? Over the upper part of the throat, immediately under the chin.

Well? Internally, we found general fluidity of the blood, and an accumulation of it in the right cavities of the heart;—in the middle of the neck we found the ligaments connecting the posterior part of two of the vertebræ torn, blood effused among the spinal muscles near the laceration, and likewise among the other spinal muscles, as low down as the middle of the back, also a small extravasation of blood into the cavity of the spine. We could find no appearance of natural disease, no appearance, at least, that could have led to death,—the only sign of natural disease we could perceive, was a very slight incipient disorder of the liver; all the other organs in the head, the chest, and the belly, were unusually sound. I forgot to mention a very small trace of blood on the left cheek, fluid blood, issuing from the nose or the mouth,—likewise a very slight contusion over the left eye. These were all the appearances that I recollect.

Mr Wood.—What part of these injuries you have described, either externally or internally, seen by you in this body, might have been occasioned, in your opinion, during life? This question is rather a new one, in some particulars at least, and, in consequence, I have been led to pay particular attention to it. My opinion on the points which I have to mention, is not founded on mere physiological reasoning; but on actual observation. I consider that the contusions could not have been produced after death; but the injury of the spine, and the collateral appearances I have described, namely, the effusion into the spinal canal, and the effusion of blood among the spinal muscles, may have been caused quite as well after death as before it;—I mean, that an injury properly applied, eighteen hours after death, would produce precisely the same appearances that Mr Newbigging and I found in this woman,—tearing of the ligaments, and effusion of blood into the spinal canal.

Lord Advocate.—Would the pressure of a body into that box, (*the old tea-box was pointed out to witness*), have been calculated to produce that effect? From all that I have understood, I think it would. The mode in which the body was packed might have that effect,—the pressing down the head would lead to that effect.

From the appearance of the body alone have you formed an opinion, which, you considered the most likely mode in which this woman came by her death? There are certain appearances I have described that would justify a suspicion of death by suffocation,—such as strangling, smothering, or throttling. These are all of them forms of suffocation. The form I suspected most was throttling, in consequence of the appearance of the cuticle under the chin.

Lord Meadowbank.—What do you mean by throttling? The hand is applied under the chin, on the throat, and pressure is made upwards and laterally at the same time.

I wish to explain. I mean those appearances that I have described, would only justify suspicion; but I have other circumstances,—

Lord Advocate.—How applied? By applying the hand and pressing upwards, the root of the tongue is pressed against the back of the throat, and the access of air to the lungs is prevented. I said that we found marks of violence from contusions throughout the body. When I add to this the appearances of suffocation,—the want of any appearance to account for natural death, and likewise the fact,—which I presume I may add, from the evidence I heard to day,—that this woman was dead a very short time indeed after she was seen alive and in health,—and farther, the blood that was found where the body lay;—from all these circumstances put together, my opinion is, that death by violence is very probable. I do not think that the medical circumstances could justify a more certain opinion.

Lord Advocate.—Suppose this woman had met her death as described by Hare and his wife, were the appearances conformable? I think so.

Suppose this woman had died from suffocation produced solely by drinking, would the appearances correspond, taking into account the blood? Of course I understand, that in suffocation from drinking, the woman would have her mouth obstructed in some way or another.—I presume the appearances would correspond, if the suffocation was produced by

the woman, for example, falling on her face in a puddle, or by her face being squeezed against a pillow. All species of suffocation may cause a discharge of blood after death. The appearance of blood discharged from the mouth and nose after death, might be produced by any species of suffocation.

Lord Meadowbank.—Under that case, do I understand that you mean to include this,—if the woman fell upon her mouth and nose from intoxication, and the blood in that way came to her head, do you count that suffocation? Suppose all this done from intoxication, does it suffocate and prevent the air from entering the lungs? There must be some mechanical obstruction, to cause suffocation in the ordinary sense of the word; without such obstruction, death from simple intoxication would be accounted a variety of poisoning.

You do not speak to a death occasioned under such circumstances? No.

Mr Cockburn.—I think you mean to say this, that death from simple intoxication arises ultimately from the exclusion of air into the lungs? Yes, speaking physiologically, death takes place in that way.

Are you aware that persons who do not die in that way, by getting themselves intoxicated, may die, because they fall into uneasy situations? Yes.

Separate altogether the externals that were taken,—of the blood being found in the room;—separate from your mind the fact of the woman having good health before,—look upon this as a body of which you knew nothing,—was there any thing in that body that indicated death by violence? I thought the appearances would justify the suspicion, but more so, when coupled with other circumstances;—I never would give my opinion ultimately and decisively upon a case of this kind, without inquiring into the collateral circumstances I have mentioned.

We can judge of other circumstances as well as medical men;—you think these views justify a suspicion,—and also, you think these appearances in the body merely suspicious? Yes.

With them join the other circumstances,—would they justify more than a probability? Nothing more. I have stated that distinctly.

I wish to mention distinctly to the Court, that, in such a case, a knowledge of the previous circumstances I have alluded to, is necessary for medical men forming an opinion, whe-

ther it is possible the person could have died of any of those diseases which do not leave morbid appearances in the dead body.

LORD JUSTICE-CLERK.—Did you open the stomach of this person? Yes.

Did you observe any thing particular in it? Half digested *porridge.*

Had it any smell of whisky? No. If it had the smell of whisky, or any narcotic, I would have perceived it.

Had the woman been in a very dangerous state of intoxication, would there have been the smell of spirits in the stomach? Not necessarily, my Lord.

LORD MEADOWBANK.—Is there generally a smell of spirits there, if the person has been intoxicated? Not always. I remember a reported case where the person died of long continued intoxication, and where it was not perceived in the stomach, although it was found in the brain.

Is there any other case that has fallen under your own observation where it was not perceived? None, but where it was perceived.

If the fluid had remained in the stomach, is it your opinion that it could not have been evaporated? If there was any portion remaining which I could have discovered by chemical analysis, I would have perceived it by the smell.

(The two declarations of each of the pannels were admitted by their respective Counsel.)

They were then put in and read as follow:

FIRST DECLARATION OF WILLIAM BURKE.

At Edinburgh, the 3d day of November 1828.

IN presence of GEORGE TAIT, Esq. sheriff-substitute of Edinburghshire, compeared WILLIAM BURKE, at present in custody, who being examined, declares, That he is thirty-six years of age, and he was born in Ireland, and he came to Scotland about ten years ago: That he is a shoemaker, and he has lived for rather more than a year in the West Port, and about two months ago, he went to the house in the West Port in which he at present lives, but he does not know the name of the entry; and the prisoner, Helen M'Dougal, has lived with him for about ten years, but she is not married to him. Declares, That he at first lodged in his present house with a man named John Brogan; but Brogan went away about ten days ago, and the declarant now lodges in the house by

himself. Declares, That James Gray, and his wife and child, came to lodge with the declarant about a week ago. Declares, That on the night of Thursday last, the 30th of October, no person was in the declarant's house, except Helen M'Dougal, Gray, and his wife. Declares, That on the morning of Friday last, he rose about seven o'clock, and immediately began his work by mending a pair of shoes: That M'Dougal rose about nine o'clock. Declares, That Gray rose about six o'clock, and went out: That Gray's wife rose soon afterwards, and lighted the fire; and the declarant then rose, as before mentioned. Declares, That he went out about nine o'clock to get some tobacco, and he returned in a few minutes, and they all four breakfasted together about ten o'clock, and the women were occupied through the day in washing and dressing, and sorting about the house; and Gray was going out and in, and the declarant was working; and declares, That on Friday evening he told Gray that he and his wife must go to other lodgings, because he could not afford to support them any longer, as they did not pay for the provisions which they used; and they went away, and the declarant accompanied them to Hare's house, to which he recommended them. Declares, That he thinks Gray and his wife went away at five o'clock. Declares, That about an hour afterwards, when he was standing at the mouth of the entry, a man came forward to him dressed in a great coat, the cape of which was much up about his face: That he never saw the man before, and does not know his name: That the man asked if the declarant knew where he could get a pair of shoes mended; and the declarant, being a shoemaker, took him home with him, and got off the man's shoes, and gave him an old pair in the meantime: That while the declarant was mending the shoes, the man walked about the room, and made some remarks about the house being a quiet place, and said that he had a box which he wished to leave there for a short time; and the declarant consented: That the man went out, and in a few minutes returned with a box, which he laid down upon the floor near the bed, which was behind the declarant, who was sitting near the window with his face to it: That the declarant heard the man unroping the box, and then making a sound as if he were covering something with straw; and the declarant looked round, and saw him pushing the box towards the bottom of the bed, where there was some straw on the floor, but he did not observe any thing else than the box: That the man then got on his shoes, paid the declarant a sixpence, and went away: That the declarant immediately rose to see what was in the box, and he looked under the bed, and saw a dead body among the straw; but he could not observe whether it was a man or a woman: That soon afterwards the man came back, and declarant said it was wrong for him to have brought that there, and told him to put it back into the box, and take it away: That the man said that he would come back in a little and do it, and then went away, but he did not return till Saturday evening about six o'clock; and when he did not return on Friday night, the declarant took the box into the entry, but allowed the body to remain under the bed. Declares, That on Saturday morning about ten o'clock, he went out to the shop of a Mr. Rymer, in the West Port, and when he was there, a woman came to the door begging, whom he had never seen before: That the people in

the shop refused to give her any thing; and the declarant discovering from her dialect that she came from Ireland, asked her from what part of it she came: she said it was from Inesomen, which is a small town in the north of Ireland, and he then asked her name, and she said it was Mary Docherty, and the declarant remarked that his mother's name was Docherty, and that she came from the same part of Ireland, and that therefore they might perhaps be distant relations; and as she said that she had not broken her fast for twenty-four hours, if she would come home with him he would give her breakfast; and she accompanied him home, and got breakfast, at which time the only other persons in the house were Helen M'Dougal, Gray, and his wife: That she sat by the fire till about three o'clock in the afternoon, smoking a pipe, the declarant going out and getting a dram, because it was Hallowe'en, and they all five partook of the dram, sitting by the fireside. Declares, That at three o'clock Mary Docherty said she would go to the New Town to beg some provisions for herself, and she went away accordingly. Declares, That he thinks Helen M'Dougal was in the house when Mary Docherty went away, but he does not remember whether Gray or his wife were in the house, and does not remember of any other person being in the house. Declares, That a few minutes before Mary Docherty went away, William Hare's wife came into the house, but went away into the house of a neighbour, John Connoway, immediately before Docherty went away; and he thinks that Hare's wife or Connoway's wife may have seen Docherty go away; and Mary Docherty never returned. Declares, That Helen M'Dougal and Gray's wife then washed the floor and cleaned out the house: That there was no particular reason for doing so further than to have it clean upon the Saturday night, according to their practice, and the declarant continued at his work: That soon afterwards Gray and his wife went away, and Helen M'Dougal went to Connoway's house, leaving the declarant by himself, and the declarant had not mentioned to any person about the dead body, and had no suspicion that it had been discovered. Declares, That about six o'clock of the evening, while he was still alone, the man who had brought the body came, accompanied by a porter, whom the declarant knows by sight, and whose stance is somewhere about the Head of the Cowgate, or the Foot of the Candlemaker Row, and whose christian name he thinks is John: That the man said he had come to take away the body; and the declarant told him the box was in the entry, and the porter took it in, and the man and the porter took the body and put it into the box and roped it, and the porter carried it away. Declares, That when the man came with the porter, he said he would give the declarant two guineas for the trouble he had in keeping the body, and proposed to take the body to Surgeons' Square to dispose of it to any person who would take it; and the declarant mentioned David Paterson, as a person who had some connexion with the surgeons, and went to Paterson's, and took him to Surgeons' Square, where he found the man and the porter waiting with the box containing the body: That the body was delivered, and Paterson paid a certain number of pounds to the man, and two pounds ten shillings to the declarant: That he then went straight home, and was informed by some of the neighbours

that a report had been raised of a dead body having been found in the house, and in particular by Connoway's wife, who told him that a policeman had been searching his house; and he then went out in search of a policeman, and he met Finlay and other policemen in the passage, and he told them who he was, and they went with him to the house, and found nothing there, and they took him to the police-office. Declares, That he yesterday saw in the police-office the dead body of a woman, and he thinks it is the dead body which was below the bed; but it has no likeness to Mary Docherty, who is not nearly so tall. And being interrogated, Whether the man who brought the body, and afterwards came with the porter, is William Hare? Declares that he is. And being interrogated, declares, That he does not know of any person who saw that Hare had any concern in bringing the body, or in taking it away. And being interrogated, declares, That the porter's name is John M'Culloch, and declares that the box in which the body was contained was a tea-chest. And being specially interrogated, declares, That the woman above referred to, of the name of Mary Docherty, was not in his house on Friday; and he never, to his knowledge, saw her till Saturday morning at ten o'clock: That she promised him to return on the same evening: but she did not, and he does not know what may have become of her. And being interrogated, declares, That he sprinkled some whisky about the house on Saturday, to prevent any smell from the dead body. Declares, That Hare did not tell him, nor did he ask, where he got the body. Declares, That he did not observe whether there was any blood upon the body. And being specially interrogated, declares, That he had no concern in doing any harm to the woman before referred to, of the name of Mary Docherty, or to the woman whose body was brought to the house; and he does not know of any other person being concerned in doing so. Declares, That Docherty was dressed in a dark gown. And being shewn a coarse linen sheet, a pillow-case, a dark printed cotton gown, and a red striped bed-gown, to which a label is affixed, and signed by the declarant and sheriff-substitute as relative hereto, declares, That the sheet and pillow-slip are his, and he knows nothing about the dark gown and bed-gown: That the blood upon the pillow-slip was occasioned by his having struck Helen M'Dougal upon the nose, as is known to Gray and his wife; and the blood upon the sheet is occasioned by the state in which Helen M'Dougal was at the time, as is known by Gray's wife.—All which he declares to be truth. (Signed) WM. BURKE.

ARCHD. SCOTT. G. TAIT.
A. M'LUCAS.
A. MACLEAN.

SECOND DECLARATION OF WILLIAM BURKE.

At Edinburgh, the 10th day of November 1828.

In presence of GEORGE TAIT, Esq. Sheriff-substitute of Edinburghshire, compeared WILLIAM BURKE, present prisoner in the tolbooth of Edinburgh, who being examined, and the declaration emitted by him

before the said sheriff-substitute at Edinburgh, upon the 3d day of November current, having been read over to him, he declares that it is incorrect in several particulars. Declares, That it was upon the Friday morning, and not upon the Saturday morning, that the woman named Mary Docherty came to the house, and that all that is said with reference to that woman up to her going out to beg at three o'clock happened upon the Friday, and not upon the Saturday; and declares, That the floor being wet in consequence of Helen MacDougal and Gray's wife washing in the house, these two women washed the floor then, rather than defer it till next day; and the floor was usually washed twice a-week, and it was usually washed on Saturday as one of the days: That those two women continued doing things about the house, and the declarant continued working till it was duskish: That the declarant then stopped work, and went out and brought in a dram, because it was Hallowe'en, and he and the two women sat by the fire and drank the dram; and while they were doing so William Hare came in; and the declarant went for more drink, and they all four sat drinking till they got pretty hearty. Declares, That when he was out for drink the second time, he found, when he came back, that Mary Docherty had returned, and was sitting by the fire, and she drank along with them: That when it was pretty late in the night, but he cannot mention the hour, he and William Hare differed, and rose to fight, and the three women were still in the house drinking, and Mary Docherty had become much intoxicated. Declares, That while he and Hare were struggling together, Helen M'Dougal and Hare's wife did what they could to separate them; but declares, that there was no noise, and in particular there were no cries of murder. Declares, That after they were separated, they sat down by the fire together to have another dram, and they then missed Mary Docherty, and asked the other two women, what had become of her; and they answered that they did not know; and the declarant and Hare searched for her through the house—and they both went straight to the straw of the shake-down bed upon the floor at the bottom of the standing bed, to see whether she had crept in there, and they found her among the straw, lying against the wall, partly on her back and partly on her side: That her face was turned up, and there was something of the nature of vomiting coming from her mouth, but it was not bloody: That her body was warm, but she appeared to be insensible, and was not breathing: That after waiting for a few minutes, they were all satisfied that she was dead, and the declarant and Hare proposed to strip the body and lay it among the straw; but they did not at that time say what farther they proposed to do; and Helen M'Dougal and Hare's wife immediately left the house, without saying any thing; and the declarant supposed it was because they did not wish to see the dead body: That the declarant and Hare waited till the neighbours should be quiet, there being a considerable stir among the neighbours on account of its being Hallowe'en, and in particular in the house of Connoway, who lives in the same passage, in case any of the neighbours should come in upon them; and they then stripped the body, and laid it among the straw; and it was then proposed by both of them, but he cannot say by which of them first,

to sell the body to the surgeons, and they both arranged that they would sell the body to David Paterson, whom they knew to be a porter to Dr. Knox, in Surgeon Square, and who they knew received subjects, and that they would put the body into a tea-chest and get it conveyed to Surgeon Square the following evening; and they then sat down by the fire again, and Helen M'Dougal and Hare's wife then returned, but nothing was said by any person about the dead body: That Hare and his wife then went home, at which time it would be near twelve o'clock on the Friday night, and the declarant and M'Dougal went to bed and fell asleep, and rose next morning soon after six o'clock. Declares, That Gray and his wife came in about eight o'clock in the morning, and lighted the fire, and prepared breakfast, and they all got breakfast together; and the declarant then went out and brought in a dram, and sprinkled it under the bed and upon the walls, to prevent any smell. Declares, That he went out about twelve o'clock noon, and was out for about two hours walking about; and when he returned he found Gray and his wife and Helen M'Dougal still in the house; and after that he was occasionally out. Declares, That after it became dark he went to call for Paterson, but found that he was out, at which time it was past five o'clock: That he then got John M'Culloch, a porter, and took him to the passage of the declarant's house, and then left him there, and went into the house and found William Hare there, but no other person; and he also saw an empty tea-chest upon the floor; and they both immediately put the body of the woman into the tea-chest; and they roped it up with a line which hung across the house for drying clothes; and they called in M'Culloch, and put the tea-chest upon his back, and told him to follow Hare, but they did not tell him what was in the tea-chest, nor did he ask them; and the declarant then went straight to Paterson's house, and found him at home, and told him that he had sent forward a subject to Surgeon Square; and he has no recollection of having seen Paterson on the Friday, or on the Saturday before that time. Declares, That Paterson and the declarant then went to Surgeon Square together, and they found Hare and M'Culloch waiting there with the tea-chest, and Paterson opened the door of a cellar, and the tea-chest was put into it: That Paterson then went and got five pounds, and gave it to the declarant and Hare, and they paid the porter, and then went to their respective homes, and the declarant, on his way home, met Helen M'Dougal; and when they got home, they heard from Connoway's wife the report of policemen having searched his house for a dead body; and he then met with Finlay, the criminal officer, and he was apprehended, and taken to the police-office, as formerly mentioned. And being interrogated, declares, That he cannot say whether the dead body he saw in the police-office on Sunday the 2d current be the body referred to. And being interrogated, declares, That he had no concern in killing the woman, or in doing any harm to her; and he has no knowledge or suspicion of Hare, or any other person, having done so; and it is his opinion that the woman was suffocated by laying herself down among the straw in a state of intoxication. And being interrogated, declares, That no violence was done to the woman when she was in

life, but a good deal of force was necessary to get the body into the chest, as it was stiff; and in particular, they had to bend the head forward, and to one side, which may have hurt the neck a little; but he thinks that no force was used, such as could have hurt any part of the back at all. And being interrogated, declares, That no other person had any concern in the matter; and in particular, declares that a young man named John Brogan had no concern in it: That Brogan came into the house on Saturday forenoon, as he thinks, while the body was in the house, but did not know of its being there.—All which he declares to be truth. (Signed) WM. BURKE.

ARCHD. SCOTT. G. TAIT.
A. M'LUCAS.
A. MACLEAN.

FIRST DECLARATION OF HELEN M'DOUGAL.

At Edinburgh, the 3d day of November 1828.

In presence of GEORGE TAIT, Esq. Sheriff-substitute of Edinburghshire, compeared HELEN M'DOUGAL, at present in custody, who being examined, declares, That she is thirty-three years of age, and she was born in Stirlingshire: That she never was married, although she has lived with the prisoner, William Burke, for ten years: That about a year ago, they came to reside in Tanner's Close, West Port, and about three months ago, they went to another close in the West Port, but she does not know the name of the close: That a person named John Brogan occupied the house in which they at present reside, but Brogan left the house on Friday eight days, and the declarant and Burke, who were living with Brogan previously to his leaving the house, took possession of it by themselves. Declares, That James Gray and his wife came to live with Burke on Sunday the 26th of October. Declares, That the only persons who were in the house on the night of Thursday the 30th of October, were Gray and his wife, and Burke and the declarant: That Burke and the declarant rose from bed on Friday morning about ten o'clock, and Ann Gray made breakfast for them; and when she was making breakfast for them, Burke went out, and said he was going to the shop, which she understood to mean that he was going to get a dram; and he came in when breakfast was ready, and in about five minutes afterwards, when they were taking breakfast, a woman came in whom the declarant had never seen before, and who afterwards said that her christian name was Mary: That Mary appeared to be the worse of liquor: That she asked leave to light her pipe at the fire, and she then asked a little bit of soap to wash her cap and short-gown, and her apron, and the declarant gave her a bit of soap, and she washed her clothes, and Gray's wife dried them and ironed them; and while that was doing, she talked about having come from Ireland in quest of her son; and soon after she came into the house, she said she had got no meat for three days, and the declarant gave her a share of their breakfast: That Burke and Mary entered into conversation; and Burke, upon hearing that

she came from Ireland, said that he came from Ireland too, and he did not know but she might be a relation of his mother's. Declares, That about one o'clock in the afternoon, Burke brought in some whisky and gave them a glass all round, it being the custom of Irish people to observe Hallowe'en in that manner: That Mary became very impatient to go away, in order to go to Saint Mary's Wynd to inquire for her son, and she went away about two o'clock. Declares, That Burke had gone out about half an hour before that, and returned about three o'clock, and when he came in, he mentioned that Nancy Connoway, a neighbour, had said to him that she wondered how he could keep Gray and his wife in the house, because the noise of their quarrelling was so unpleasant to the neighbours; and therefore he told them to go away, and never to come back again, because he had not uppputting for them; and Gray and his wife accordingly went away immediately. Declares that Hare's wife happened to be in the house at the time, and said that she would give them a night's lodging, as she had spare beds, and the declarant supposed that they went to Hare's, and it would be about six o'clock when they went away: That Burke went to Hare's house about seven o'clock, and the declarant went about half an hour afterwards: That when she went to Hare's house, Burke was not there, but she went to an adjoining shop and brought him there, and they had some supper and drink there: That the declarant then went home, and Burke followed soon afterwards, bringing some whisky with him, which he had got in a shop; and soon afterwards Hare and his wife came in, and they four had some spirits together, and Nancy Connoway, before mentioned, came in and had a share of the spirits: That the declarant then went to Connoway's house and had a dram, and then returned to her own house, and found Hare and his wife still there: That they almost immediately went away, but very soon returned, and Hare was very much intoxicated, and Hare lay down in the bed, and slept along with Burke all night; and the declarant and Hare's wife slept on the floor: That about six o'clock in the morning Hare and his wife went away: That about seven o'clock, Gray and his wife came in to get some clothes which they left, and the declarant and Burke lay down in bed, and about eight o'clock Burke rose and told Gray's wife, who still remained in the house along with her husband, to sort the house and get the kettle boiled, and he himself went to a neighbouring shop for tea and sugar, and bread and butter: That when Burke came, Gray's wife made the tea, and Gray and his wife and Burke took breakfast together, and a young man named John Brogan, came in and got a share of it: That the declarant did not take any of it: That after breakfast Gray's wife washed the floor, and cleaned the house, the declarant being in bed unwell, in consequence of drink which she had had, and Brogan was in the house most of the day: That Gray remained in the house all day: That Burke was sometimes out and sometimes in, and he lay down for a short time: Declares, That about five o'clock that afternoon, the declarant sent Mrs. Gray to Mrs. Law's with some clothes to get mangled; and Gray and his wife left the declarant's house about seven o'clock to go

to their lodgings; and shortly after they so left the house, Mrs. Law came and asked the declarant if she gave Mrs. Gray orders to get her gown: That the declarant said she had not, and Mrs. Law then said that she was off with it; and in a little after, a girl came in and told the declarant that a man was on the street with the declarant's gown, and she went out and found Gray standing at the head of Tanner's Close with the gown under his arm: That she got her gown from Gray, and the declarant and Gray and his wife and Mrs. Hare had a dram together, and the declarant left the gown in Mrs. Law's to get mangled: That the declarant then went home and kindled her fire, and she went out for her husband as it was late; and after she found him they went into Connoway's house, where they remained for a few minutes, and Connoway told them that Mrs. Gray had been raising a disturbance, and the declarant and her husband were going out of Connoway's house when they were apprehended by two policemen, who said that they had taken a corpse out of the house. And being interrogated, declares, That she did not see Mary after two o'clock on the Friday; and in particular, she did not see her in the house on the Friday night. Declares, That she yesterday saw the dead body of a woman in the police-office, but declares, that it is not the body of the woman named Mary, because Mary had dark hair, and the body of the woman in the police-office had grey hair. And being interrogated, declares, That she had no knowledge or suspicion of there being any dead body in the house, and in particular, of its being under the bed, till after she was apprehended; and declares, that there is only one bed in the house; and declares, that so far as she knows, nothing was under the bed except a few potatoes, and a little straw which had fallen from the bed. And being interrogated, declares, That she had no conversation with Gray regarding a dead body, and in particular, never promised him any money not to say any thing about a dead body. And being shewn a coarse linen sheet, a coarse pillow-case, a dark printed cotton gown, and a red striped cotton bed-gown, to which a label is affixed, and signed by the sheriff as relative hereto, declares, That the sheet belongs to a William M'Kim, from whom the declarant got a loan of it: That the pillow-case was used for containing dirty clothes, and lay at the head of the bed as a pillow: That she never saw the dark gown before to her knowledge; and declares, that the bed-gown is like the one which Mary wore on the Friday, but she cannot say that it is the same, as it is torn. Declares, That Burke had no money on Friday, and he had to borrow money for their breakfast on Saturday morning; but the declarant got three shillings from him on Saturday night about nine o'clock, but she does not know where he got that money. And being specially interrogated, declares, That she had no concern in killing the woman Mary, or in hurting her, and does not know of Burke or Hare, or any other person, being concerned in doing so, or in concealing the dead body about the house, or in afterwards disposing of it. And being interrogated with regard to some marks of blood on the sheet and pillow-slip, declares, That the marks upon the pillow-slip were from her nose bleeding in consequence of Burke having struck her on last Thursday, as she thinks; and both Gray and his wife know of Burke having struck her; and the blood

upon the sheet proceeded from the declarant, in consequence of her state at the time, as was known by Mrs. Gray.—All which she declares to be truth.—Declares she cannot write.

ARCHD. SCOTT. (Signed) G. TAIT.
A. M'LUCAS.
A. MACLEAN.

SECOND DECLARATION OF HELEN M'DOUGAL.

At Edinburgh, the 10th day of November 1828.

In presence of GEORGE TAIT, Esq. Sheriff-substitute of Edinburghshire, compeared HELEN M'DOUGAL, present prisoner in the jail of Edinburgh, who being examined, and the declaration emitted by her before the said Sheriff-substitute at Edinburgh, upon the third day of November current, having been read over to her, she adheres thereto. And being interrogated, declares thereto, That between the hours of three and four o'clock on Friday afternoon, the woman named Mary insisted on having salt to wash herself with, and became otherwise very troublesome, and called for tea different times, and the declarant told her she could not be troubled with her any longer, and thrust her out at the door by the shoulders, and never saw her afterwards. And being interrogated, declares, That Brogan did not bring any woman to the house. And being interrogated, declares, That William Burke and William Hare had a slight difference and a struggle together on Friday night, as she thinks, but there was no great noise made, and no cries of murder, so far as she heard.—All which she declares to be truth.—Declares she cannot write.

ARCHD. SCOTT. (Signed) G. TAIT.
A. M'LUCAS.
A. MACLEAN.

Here the Proof on the part of the prosecution closed; and the pannels having brought forward no Exculpatory Evidence:—

The LORD ADVOCATE addressed the Jury in nearly the following terms:—

May it please your Lordships.—Gentlemen of the Jury—It is now my duty to make a few remarks on the tenor of the evidence which has been laid before you in support of the indictment against the pannels at the bar; and, at this late hour, when you must be exhausted with the long trial in which you have been engaged, I shall endeavour not to detain you long. Indeed, had this been an ordinary case, I should have had great pleasure in leaving the evidence to your own judgment, without one word of comment from me; satisfied that, in the charge which you will receive from the Court, before you retire, a luminous and impartial detail of its substance and

bearings will be given. But this is a case of no ordinary complexion, and I am, therefore, called on for some observations, more especially as you will be addressed on behalf of the prisoners by my honourable and learned friends on the other side of the bar; and it might be thought remissness on my part, if I were to allow the evidence to go to you for a verdict, without some remarks on its tendency.

Gentlemen, it affords me peculiar satisfaction to see, in a cause of this kind, so full and formidable an array of counsel for the defence. In all cases, the bar of Scotland does itself honour by undertaking the defence of the unhappy persons who are brought before this Court accused of offences; but, in this case, I am happy to see the most distinguished among my brethren engaged in the defence of the prisoners. It is for the ends of public justice that this should be; and it is a great consolation to me, in the discharge of my painful duty, that the pannels will derive all the benefit which may be looked for, from the knowledge and the eloquence of such distinguished advocates. If an acquittal should follow the proceedings in which we have this day been engaged, I hope it will be acknowledged that I have only done my duty to the public in putting these prisoners on their trial; and, should they be convicted, the country must be satisfied that the conviction will be just, when the defence is in the hands of counsel so eminent, and so universally and deservedly respected.

Gentlemen, this is one of the most extraordinary and novel subjects of trial that has ever been brought before this or any other Court, and has created in the public mind the greatest anxiety and alarm. I am not surprised at this excitement, because the offences charged are of so atrocious a description, that human nature shudders and revolts at it; and the belief that such crimes as are here charged have been committed among us, even in a single instance, is calculated to produce terror and dismay. This excitement naturally arises from detestation of the assassins' deeds, and from veneration for the ashes of the dead. But I am bound to say, that whatever may have occasioned this general excitement, or raised it to that degree which exists, it has not originated in any improper disclosures, on the part of those official persons, who have been entrusted with the investigations connected with these crimes; for there never was a case in which the public officers to whom such inquiries are confided, displayed greater secrecy, circumspection, and ability. It is my duty, Gentlemen, to endeavour to remove that alarm which prevails out of doors, and to afford all the protection which the law can give to the community against the perpetration of such crimes, by bringing the parties

implicated to trial; and I trust it will tend to tranquillize the public mind, when I declare I am determined to do so. I cannot allow any collateral considerations, connected with the promotion of science, to influence me in this course; and I am fully determined that every thing in my power shall be done to bring to light and punishment those deeds of darkness which have so deeply affected the public mind.

Gentlemen, before I proceed to detail the evidence now laid before you in support of the indictment against the prisoners, I must impress upon you what will be more eloquently and emphatically told by their counsel and the Court, that in judging upon the only charge now under trial, you are to banish from your minds all impressions which you may have received from any other source than from the evidence itself. To that evidence alone you must confine your attention,—in particular, you are not to allow yourselves to be moved, by the fact, that there were other charges in the indictment, of a similar description; because these charges have now been entirely withdrawn, for the present, from your consideration. Those charges have been separated from that now to be tried, at the special desire of the prisoners themselves, and to remove any ground of objection that an impression might be created to the prejudice of the prisoners. The pannels are accused of murder,—and the three instances that were libelled, were only three separate facts, in support of that general charge. But since the prisoners and their counsel have made their option to be tried for each separately, and the Court have sanctioned this course, I willingly acquiesce in it. I must say, however, that in framing the indictment, including all the three charges, I was warranted by the practice of this Court; and that my chief object in doing so, was for the purpose of probing to the bottom the whole system of atrocity, a part of which I have this day brought before you.

In going over that proof, Gentlemen, it is not necessary that I should read over to you fully the notes of the evidence,—because that will be more ably and authoritatively done by the Court, than it can be by any one in the situation of Public Prosecutor. I shall, therefore, content myself with a condensed and connected reference to its import,—from which, I have no doubt, you will find a verdict of guilty against the pannels.

The evidence has been led in the order of time, and I shall observe that order, in what I am now to say. The first witness is Mrs Stewart. She tells you that Docherty had come to her house in the Pleasance, on Thursday, the 30th of October, being the fast day, in search of her son, who had re-

sided there for two months; but had quitted the house on the preceding Monday. That not having found him, she left Stewart's house next morning, in order to go in search of him. She describes her appearance, and the clothes she had on, and says that she was in perfect health when she left her. She did not again see her in life; but she saw her body in the Police-Office two days afterwards, and had no difficulty in identifying it. The next witness is Charles M'Lauchlan, to whose house, in St Mary's Wynd, Docherty came, on quitting Mrs Stewart's; and he tells you that she was then, and had been all the time that she was at Stewart's, in perfect health; that she had no money, and that she said she was leaving town. He also saw the body on the Sunday, and identified it. Instead, however, of proceeding on her way, she called at the shop of a person of the name of Rymer, about nine o'clock of the same morning; and you see from the evidence of William Noble, that when she entered that shop, the prisoner at the bar, Burke, was there. This poor woman was without a farthing,—she was begging her way,—he enters into conversation with her, and inquires concerning her family, and says that she was some relation of his mother's. He offers her her breakfast, and thus induces this poor woman to go to his house. This man, in all probability, thought that no human being would ever make any search or inquiry after this woman. Then, gentlemen, the next witness, in point of time, is Mrs Connoway. She describes her house as adjoining to that of Burke, and says, that early in the forenoon of the same day, she saw Burke enter his house, followed by a woman, immediately behind him. Mrs Connoway had occasion to go into Burke's house in the course of the day, when she saw this woman in company with Burke and M'Dougal; she returned again in the same evening, where she saw the same woman washing her clothes, and had a conversation with her;—she describes her, in point of appearance, dress, and every other respect, in such a way, as to leave no doubt that she was the same individual who came from Mrs Stewart's in the morning. She was then the worse of drink; and Connoway advised her not to go out, lest she should be taken up by the police, on that account. She followed Connoway into her house, where she insists that Burke's name is Docherty; and gives us the reason, that that was the name he had given himself to her. They are then joined by M'Dougal, Hare, and his wife. Spirits are produced, and drank. They became all merry, and were dancing and singing. All the party then quit Connoway's house, excepting Docherty, who remained there till between ten and eleven o'clock; when seeing Burke

going into his house, she follows him. Connoway then gives an account of a disturbance in Burke's house, which prevented her sleeping. The next witness, Mrs Law, confirms Mrs Connoway's statement, and says, that in the disturbance which took place in Burke's house, she heard Burke's voice,—thus proving that he was at that moment in his house. The next evidence in point of time, is a person of the name of Alston:—He lives, it appears, in the first flat of the house from the street, or the second storey above Burke's house; and he states, that he was alarmed by the noise which he heard issuing from Burke's house, about half-past 11 o'clock of the same night,—that he went down to the entry where Burke lived, and there he heard two men fighting, and a woman calling murder, but not as if she was in imminent danger. He says, that after standing for a minute or two within three yards of Burke's door, he heard something give a cry, as if it was strangled. He could hardly distinguish if it was that of a human being, or of an animal. This description of the noise heard, leaves little doubt, but that, at that moment, Docherty was suffering by strangulation. It is most singular that Alston should have come home on this evening at *half past eleven* at night, at which time, no doubt, this dreadful act of murder was committed. Alston then goes for the police, but not seeing a watchman, he returns to the entry; by which time, the tumult had subsided, and he went home. The next evidence to which I shall allude, is a very short testimony, but one which goes to establish a matter of great importance; I mean that of the sister of David Paterson:—She tells you that Burke came to her mother's house that night at 10 o'clock, asking for her brother. At this time, M'Dougal, Hare, and his wife, were all in Connoway's, Burke alone was absent. Now, it is our business to inquire where he was during this interval; and why he went to Mr Paterson's. You will observe, that David Paterson is an assistant to Dr Knox, and it is in evidence that he and Burke had had frequent dealings respecting dead bodies; it cannot, therefore, be difficult to conceive why Burke wished to see Paterson that night, when he foresaw that he should so soon have a body to dispose of. If this was his object, you will readily see, that by going in search of this person at 10 o'clock, when Docherty was still alive, he demonstrated his predetermined purpose to put her to death. This is rendered more apparent by what follows:—Alston hears the sound of strangulation at half-past 11 o'clock; and the next witness, namely, the said David Paterson, swears that he came home at 12 o'clock at night. He tells you expressly the hour when he reached his own house;—and when he was entering it, he found Burke knocking at the door, wishing

to see him; so that there can be no doubt but that the moment after the frightful deed was committed, he left his own house and went to that of the witness. He then asked Paterson to go with him to his house. He accompanied him accordingly, and the distance being short, he reached the house nearly at 12 o'clock at night,—when this woman, who was well and dancing in Mrs Connoway's an hour before, was not visible. He told you, that he saw there two men and two women; and further, he told you, what was confirmed by other evidence, that Burke pointed to the corner where the straw was, and said, 'there lies a subject for the doctor to-morrow.' These emphatic words will not escape you, nor the moment when they were spoken, nor the person to whom they were addressed. They prove not merely the time of the murder, but the base purpose for which it was perpetrated; namely, to obtain the sum of £8 or £10, as the price of the body. It is quite horrifying to think that human beings could be found willing to commit deliberate assassination for such a bribe. The next witness examined was the lad Brogan, whose testimony is of little importance, unless to shew the total indifference felt by the prisoners, in consequence of what had been so transacted. He tells you that he came into Burke's house about two in the morning, and that he and the prisoners, and Hare and his wife, slept quietly, as if nothing had happened; and this, while Docherty's dead body, though unknown to Brogan, was lying within a few feet of the spot where the party was reposing. Next follow two very important witnesses, Mr and Mrs Gray, who were lodgers in Burke's house;—They had lodged there for some time, and would have remained there that night; but Burke contrived to get them out of the way, by procuring a bed for them elsewhere. It is proved that no cause existed, or could be assigned, for this removal; and, accordingly, instead of allowing them to find accommodation for themselves, Burke went himself and procured a room for them, and met them next morning, and with much civility agreed to pay for their night's lodgings. This is a point of material consequence in this case. But can it be necessary to ask why it was requisite that these persons were not to sleep in Burke's house during that one night? Is it not apparent that the object was to prevent their seeing, and doubtless preventing, the horrid deed. But, can any thing more clearly demonstrate predetermination on the part of this prisoner to commit the crime of which he is here charged. These witnesses mentioned, farther, that Burke called up in the evening, obviously to see that they were safely housed; and he invited them, next morning, to come down and breakfast with him.

They described also what took place on this occasion; that Mrs Docherty was not to be seen; that spirits were thrown over the room, evidently with a view to absorb the smell that might naturally be expected to arise from the dead body; that the spirits were thrown particularly under the bed, and on the place where the body lay. These persons very naturally asked what had become of the old woman. You, gentlemen, will recollect the answer they received from M'Dougal, viz. that she had been too familiar with William, and that she had kicked her out of doors the preceding night; using, at the same time, epithets, which it is unnecessary for me to repeat. You next see Burke's attempts to prevent Mrs Gray approaching the spot where the body lay; and that woman afterwards discovering it, to her utter horror, stript naked, and lying among the straw. She calls on her husband, and the neighbours, Mrs Law and Connoway, who are no less horrified than herself; and all these persons identify the body as being that of Docherty. By the witnesses who follow, it is proved, that in the course of the afternoon this body was put into the box now standing before you, which had that day been bought by Burke from Mr Rymer, brought part of the way by Mrs Hare, and then by M'Culloch, who assisted Burke and Hare in forcing the body into the box. The box is then carried to Surgeon Square, and is deposited in the cellar;—and these individuals proceeded to Newington, obtained the price they expected, viz. £5 paid down, with the promise of the like sum to be paid the following Monday. Gray, in the meantime, gives information to the police,—means are taken to recover the body, which is carried to the police-office, where it was recognized by Mrs Law, and a number of other witnesses, as the body of Docherty. Now, gentlemen, besides this evidence, we have two *socii criminis*, who witnessed this act. Hare and his wife detail all the shocking particulars of this sad tragedy. From them it appears, that early in the day, Burke told Hare that he had got a shot for the doctors in his house, and sent him down to administer spirits to the woman. Hare then recites the events of the evening,—the individuals present,—the actual, or rather pretended quarrel,—the overturn of Docherty in the course of it,—and this almost at the moment when she attempted to interfere in behalf of Burke, saying he had been kind to her. Next follows the hideous act of this man Burke throwing himself on the body of Docherty, and, like a tiger, catching at her throat, mouth, and nose, and then holding her, while in the agonies of death, for nearly fifteen minutes. After all, it is supposed that life was not extinct: The same diabolical means are therefore renewed; and the purpose being

at last accomplished, she is doubled up, and thrown into the straw, in a corner of the room. Such details are enough to freeze one's blood, and excite our wonder that such monsters in human form should be found in existence.

Such is a summary of the evidence which has been led,—but it is necessary to look at it more closely, so as to see whether it establishes the two essential points requisite in all such cases, namely,—1. That a murder has been perpetrated;—2. That the prisoners were the individuals who committed that crime.

On the former of these points, the state of the body is first to be attended to. In general, that alone decides whether a murder has or has not been committed. If a man is killed by a blow, this, in general, is demonstrated by a fractured skull, or by some other violent contusion. If he is poisoned, the contents, and state of the stomach, establish the fact. If stabbed, the wound shews the cause of death. But here, the perpetrators were men of science, who seem to have known how to commit murder, without its being visible on the body. By shutting up the mouth and nostrils, and by pressure on the chest, it appears that an individual, when in a state of intoxication, may be easily deprived of life, without any certain mark remaining to explain the cause. The medical gentlemen have told you, that they could go no farther than to say, that, in their opinion, it was most probable that this woman died of suffocation. The fact of the murder, thus comes to be a question, which you must decide from the whole evidence before you. It will be kept in mind, that this woman is proved to have been in perfect health before, and on the day on which she died. She was well when she left Mrs Stewart's in the morning, and she was dancing and singing in Conneway's house down nearly to 11 o'clock in the evening, when she followed Burke into the house; and she was dead before 12 o'clock of the same night. Added to the sudden nature of this death, you have the fact, that the body, on examination, exhibited internally every proof of health. That no apparent cause of death could be *there* discovered; while the countenance was livid,—the eyes suffused,—the throat ruffled,—a quantity of blood mixed with saliva issuing from the mouth, and, in short, every appearance that could denote strangulation. You find Dr Christison swearing, that if she was smothered by Burke, in the manner described by the witnesses, the appearance of the body entirely corresponded with what such an act would have produced; and although Mr Black says, that from the appearance of the body at the Police-Office, he could not have ventured to say positively that the deceased had been

strangled, he swears, that if he had found the body lying with the blood and saliva issuing from the mouth, as when it lay on the straw, he would have had no doubt on the subject. Such facts, and such opinions, I confidently submit, ought to leave no reasonable doubt in your mind as to the cause of death. But if your minds can be supposed to hesitate on that point, look only to the evidence of the two witnesses, Hare and his wife, who saw the deed committed. I will fairly confess, that I had much reluctance in admitting either of these persons to give evidence for the Crown, and I will openly state my reasons for doing so. In the *first* place, whatever might be my own opinion, I could not be certain that a Jury would hold the circumstances which I have just stated, as amounting to complete proof of the *corpus delicti*, or act of murder. I could not shut my eyes to the doubts expressed by the medical men as to the cause of death,—doubts which were more strongly expressed in the first stages of those inquiries, than they have been stated this day. I could not forget that it was *possible* that this woman might, as in the instances mentioned by Mr. Black, have died from the effects of intoxication, or might have been killed in the course of the affray that then took place; in which case, the crime would not have amounted to murder, but only to culpable homicide. These things being possible, I knew how strongly the eloquence of counsel would press upon a Jury their bounden duty, to take the most favourable presumption for the prisoners, and either to acquit or to find the lesser crime proved. Be it remembered, that at that time, nothing was known of any other murders, and that we were dealing alone with that of Docherty; and that of the four prisoners concerned in the deed, not one of them, after being kept for weeks in prison, and being repeatedly under examination, would admit any participation in the crime. Let me ask, if in such circumstances, I was entitled to hold, with certainty, that a Jury would doom four persons to a capital punishment? In the course of the trial, and still more if an acquittal had followed, would I not, in such circumstances, have been taunted with a failure of duty, in not admitting some of these prisoners to give evidence, so as the certainty of the murder might be established, and the Jury and the country made to know how, and by what individual, it was committed. In a case where I deemed it of the last importance that an example should be afforded, I did not conceive myself warranted to risk a trial without such evidence; and I am persuaded, that those who will place themselves in my situation, will not say that they would have acted otherwise. It is thought the women ought to have been selected; I answer, that they both positively refused to say a

word on the subject; and at any rate, from their respective connections with the men as then understood, and still believed, they could not have given testimony against them. But I will own that I had another, and a no less forcible reason. I must remind you, that though there were rumours and suspicions abroad, there was then no certainty of any other crime excepting that connected with Docherty. Had a trial taken place under such circumstances, and the parties been acquitted, it was obvious that they would have returned to their former practices, whatever they were, with encreased encouragement and confidence, from such a result;—or suppose that they had even been convicted in Docherty's case, that would doubtless have led to the punishment of these offenders. But in what state would it have left the magisterial functionaries? They would have remained entirely ignorant at this moment, of the extent to which such crimes had been carried by these persons; whether these four individuals comprehend the whole gang, or if there were others connected with them, or whether similar gangs did not exist in other places. Such a state of ignorance appeared to me altogether inconsistent with the security of the public. I considered a knowledge of these matters indispensable, and as being of infinitely more public importance, than any punishment which could be inflicted on those offenders. I did not think then, nor do I now, that such information was too dearly purchased, by admitting some of these individuals to give evidence; and I am persuaded that the country, when this matter comes to be calmly considered, will support me in the propriety of the choice I so made. Such being one main object, need I say that a mere disclosure of the circumstances connected with Docherty's case, could not suffice. It was indispensible that these individuals should tell all they knew in regard to every other crime in which they had been concerned, along with the prisoners, as also, in regard to any person who might be accessory to deeds of the kind. Such disclosures, Have accordingly made; and from the information so furnished, the two other crimes stated in the libel, which otherwise would have never been rendered certain, or have made their appearance in a Court of Law, have been brought to light, in such a way as to warrant my preferring them as substantive charges against the prisoners. Of the other information given, the Magistrates now have the advantage, and the public will reap the full benefit. I need hardly say, that by availing myself of such information, I necessarily excluded the possibility of bringing these witnesses to trial, for any offence in which they so acknowledged a participation. In the present state

of excited feeling, the justice of this may not be felt; but in moments of excitement, firmness, and the exercise of sound discretion, are peculiarly called for. And sure I am, that if I was to take advantage of disclosures so made, and to bring Hare to trial for any of the crimes he so confessed, such conduct would not only be openly exposed by the Bar, but would deservedly call down the censure of the Bench, and of the jury, aye, and of the public at large, when they came to think coolly on the subject, and should look to the consequences to which such a proceeding might in future lead. It is naturally revolting to see such criminals escape even the punishment of human laws; but this must be borne, in order to avoid greater evils; and it may form some consolation to reflect, that such an example of treachery, by a *socius criminis*, must tend to excite universal distrust among men concerned in similar crimes, if any such should hereafter exist. Fortunately for the safety of life, a crime of this nature cannot, in all its details, be accomplished without assistance; and nothing can be more calculated to deter men from its commission, than the probability of the perpetrators readily betraying each other.

I have gone into this detail, not only in my own justification, but to shew you that these witnesses were in perfect freedom to give their evidence, and had no inducement to say any thing but the truth. I should indeed have blushed to have put men into that box to bear evidence against those prisoners, under *any* feeling that their own trial and punishment might depend on the nature of the testimony which they were to give.

At the same time, I do not present these persons to you as unexceptionable witnesses. Assuredly they are great criminals; but the law has said that their testimony is admissible, and thus pronounced it not undeserving of all credit. It is for you to judge of the degree of credit to which they are entitled. You saw them examined, and will draw your own conclusions. I may be prejudiced; but to me it did appear, that while the evidence of the wife was on many points exceptionable, Hare himself spoke the truth. Notwithstanding all the ability shewn in the cross-examination, I do not recollect one particular on which he was led to contradict himself, or state what must be false. Doubtless, there exist inconsistencies betwixt his evidence, and that of his wife; but these are not of a nature that ought to induce you to withhold all credit from their testimony. The points of difference regard immaterial particulars of small moment, as to whether the same individual was sitting or standing at the time, or lying on the bed, or going out

into the passage; a difference on this point, ought not to vitiate evidence. Your own experience will tell you how difficult it is to find two individuals, who, however disposed to speak the truth, will concur in such particulars, in regard to an interview which occurred at the distance of two months. But look to the situation in which these persons were placed. Look to the size of the apartment in which all this occurred. Recollect that all present are proved to have been nearly intoxicated at the time, and remember, that an act of foul murder was then committing. Is it possible that they should not have been in a state of unusual excitement and alarm at the time, and is it wonderful that their memories should have served them differently, in regard to such trifling particulars as those to which I have alluded. If they had been at one on all these points, the only just inference would have been, that the story had been entirely made up between them, and their evidence, in consequence, not entitled to any credit. But look to the main part of the case, the murder, and the mode in which it was done. That was a fact sufficient to rivet attention, and to render sober any one, however inebriated. On this material point, you find these witnesses entirely concurring, both describing the same mode of death, and both describing a mode which corresponds completely with the appearance of the body, and which, in the opinion of the medical men, satisfactorily accounts for the death. That both Burke and Hare were participant in this foul act, no one can doubt. And I need not state to you, that it matters not which was the principal aggressor in its execution. They are both, art and part, guilty of murder.

If, then, you believe that the act was so perpetrated, there is an end of the case. The murder itself is proved, and it is rendered unquestionable, that it was committed by the prisoner's hands. But do I ask you to believe the testimony of these witnesses unsupported,—far from it. Look again to the facts proved by other testimony, to which I have already alluded, all tending to confirm the statements of these persons, and shewing that Burke, from first to last, was the leading instrument in this horrid deed. Call to mind Burke's first meeting Docherty in the morning, and seducing her to his house, under pretence of relationship, or that he bore the name of Docherty, which the poor woman insisted with Mrs Connoway was his real name;—his accompanying her home, and being seen by Connoway entering his own house along with her;—his insisting on Gray and his wife sleeping in another house for *that night*, and his paying for their bed; thus fixing the time of the premeditated act, and chusing his own house as the spot where

it was to be committed;—his going in search of Paterson, before the murder was perpetrated, obviously with the view of transacting for the body;—his again going for Paterson immediately after the deed, and bringing him to the spot, and pointing to the straw, saying, there is something for the doctors to-morrow,—all these, as proved by unexceptionable evidence, were the acts of Burke alone, unaided by Hare:—his treaties next day as to selling the body at Surgeon Square;—his providing the box, into which it was to be carried;—procuring and paying the porter who carried it;—and then proceeding to Dr Knox's premises with it, and getting payment of part of the price. These facts all tend to confirm the testimony of the Hares, and they remove every degree of doubt as to the prisoner's guilt, and present this man as the premeditated author, and leading instrument, in the perpetration of this most hideous act. Then we have the evidence of Mr Alston, who, by the interference of Providence, appears to have come to the spot at the very moment. Doubtless, a discrepancy exists between his evidence and that of the Hares, as to the calls of murder; and a doubt arises by whom these were made. My own impression is, that these cries came from the women when in the passage, incapable to resist the feelings which such a scene produced. But in whatever way that is viewed, most obvious it is, that Mr Alston's evidence confirms that of the Hares, as to the act of strangulation being committed at that very moment, within half an hour after Docherty had been seen in good health leaving Connoway's house, and accompanying Burke into his; and within the like time before the body was pointed out by Burke to Paterson as a corpse. That Burke was present when that deed was thus performing, is proved altogether independently of the Hares. He was seen by Mrs Connoway going into his house within half an hour before. Mr Alston expressly says, that he heard Burke's voice in the house at the time to which he speaks; and Mrs Law, on being asked if she could distinguish any persons voices in the course of the affray, says, she was not sensible of any person's voice but Burke's. In addition to this, you see that immediately after the deed, he calls in Paterson, and expressed himself in a way that shewed his knowledge of what had been transacted; and, in his second declaration, Burke unqualifiedly admits his presence during the whole scene. In the first declaration, he, indeed, tells a story entirely false from beginning to end,—a proceeding not very indicative of innocence; but, in the second declaration, he confirms Hare, not only as to his own presence, but in all the important particulars which

occurred; excepting always as to the cause of death, which he describes as proceeding from suffocation, by Docherty having fallen amongst the straw. But even here, he renders his assertion unavailing; for instead of her face being pressed down, so as to lead to suffocation, he says,—' they found her among ' the straw, lying against the wall, partly *on her back*, and ' partly on her side: That her *face was turned up*,—and there ' was something of the nature of vomiting coming from her ' mouth, but it was not bloody.'

I shall not detain you longer with the case of Burke, and shall only say, that if this mass of direct and circumstantial evidence, applicable to an occult crime of this description, shall not convince you of the guilt of this prisoner, the situation of the prosecutor, or rather of the country, will be most deplorable. Is it to be supposed, that such offenders can be so insane as to commit murder in the presence of unexceptionable witnesses; or can we suppose that such witnesses would stand by and see the deed done, in order, afterwards, to give evidence against the perpetrators? Unless this is to be declared indispensable, I do not in my conscience see how more proof could be afforded than what here occurs; and should this be held insufficient, I see no other result, but that this frightful crime must, in future, go unpunished.

It remains for me to say a few words as to the case of M'Dougal. She is here charged, in our law language, as guilty, art and part, of this murder; in other words, that she was accessory to it. It was my intention to have read some passages from our law-books, to shew what is there held to amount to such accession; but at this late hour, I avoid doing so, the more especially, as any intelligent mind can, without such light, be at no loss on this subject. By accession, is meant a person being cognizant of, and a party to a murder, although the act of slaughter is not the immediate act of his own hand. Such accession may arise from acts done previous to the deed, during its commission, or even after its completion. In the present instance, the prisoner, M'Dougal, was an accessory to Docherty's murder, in each and all of these respects.—1. She was aware of Burke's intention to commit the crime, and she not only took no means to prevent it, but aided the enterprise, by alluring and detaining the woman in the fatal den, until the deed was done. You will observe that she saw Burke bring to his house, as a lodger, a woman in the situation of a beggar,—a woman who had not a farthing in the world,—and to whom he was pretending to be related, and to bear the same name, and whom he proposed to furnish with board and entertainment

for a week;—she saw him turn out of his house, in order to make way for this woman, two persons who had been previously lodging in his house. This she saw arranged not for a whole week, during which Docherty calculated upon remaining there, but for *one night* only; and for this night's lodging Burke was to pay the charge. Is it possible that M'Dougal could see all these things, supposing her to have seen and known nothing more, and not to have drawn the conclusion that something serious was intended. But the matter is not left to inference,—she not only drew the conclusion, but she ascertained the fact; for in the course of the forenoon, she told Mrs Hare that there was a *shot* in Burke's house. The meaning of that ominous term has been explained to you. It imported a person intended to be murdered, and the body to be sold for dissection. There cannot be a doubt, but that M'Dougal so understood the term at the time, and that she intended to convey that meaning to Mrs Hare. Thus, is she proved to have previously known of the intended murderous act; and what did she do? Did she fly from the murderous scene, as she might at once have done, being united to Burke by no tie which she could consider binding; or having resolved to remain, did she do any thing to prevent the murder? Did she avail herself of the many opportunities of Burke's absence, to advise this poor woman to depart during the course of the day? No, she treated her kindly, set her to work in washing her clothes, and did not fail to administer to her the modicum of whisky; as Mrs Connoway says, that she found her the worse of drink when she went into Burke's house in the evening, and when Docherty accompanied Connoway into her house. In this last house, a scene takes place, which illustrates the feelings of these persons; knowing, as they then did, what was about to be acted. You see a bottle of spirits produced, of which they all joyously partake; and M'Dougal and the two Hares together, with this poor woman, set a-dancing and singing, and enjoying every kind of merriment. Can such proceedings be considered in any other light, but as means for decoying the victim into the snare, and making her fall the easier, by the state of inebriety into which she was thus led. And if you believe these facts, am I not entitled to ask, if they were not all of a nature calculated to give effectual aid to the preconcerted deed, and whether they do not of themselves constitute an accession to this crime? At length, Burke arrives, accompanied by Docherty; the pretended affray then ensues, in the course of which, if you believe Hare, Docherty twice attempted to make her escape, and was twice brought back by M'Dougal. If

this fact be true, it is of itself decisive, not merely of this woman's accession to the deed, but almost in the participation of the foul act just then to be accomplished. So much for what took place *before* the murder: next, for the moment of its commission. Beyond all doubt, M'Dougal was present and witnessed the deed; and it is no less certain, that she did nothing to prevent it. True, she did not lend a hand in aid of the act; but her presence on such an occasion, when nothing is done to help the sufferer, is substantially an assistance. It encourages the murderer. It adds to the terror, confusion, and danger of the deceased. You see it proved, that when Burke and Hare were engaged in combat, M'Dougal and Mrs Hare scrupled not to expose themselves to injury, by interposing to separate those drunk men when so employed. But when, in a few minutes after, this frail creature, one of their own sex, who had been seduced into that house under a shew of hospitality, was meeting her death under the hands of the murderer, Burke,—for whose safety a moment before, who, poor thing, had expressed an anxious wish for Burke's safety,—not a finger was moved, or an attempt made by either of these females to prevent this inhuman sacrifice, or to rescue the victim from the hands of the assassin. It is said, that unable to bear the sight, they ran into the inner passage, the outer door of which was shut, and there they stood quietly till the deed was completed. But why did they so stand? Why did they not call upon the neighbours? Mr Connoway's house was within two yards of them; Mrs Law's, little farther; and yet no help was asked from them. Had they but opened the door, they would have found Mr Alston at that moment in the passage, and all might have been well. In such circumstances, it is difficult to give such women credit for their pretended feeling, and not doubt whether the true purpose of their taking up their position in the passage, was not of a very different nature; and that the real object of what they so did, was to prevent intrusion, and to give notice if any such should be threatened. But if we are to talk of the feelings of these women, let us look to their subsequent conduct. They return quietly into the house, lay themselves down within a few feet of the murdered body, and there go soundly to sleep for the night. Had these women not been prepared for the act,—had the murder come upon them unknown and unexpected,—is it in nature, that such could have been their conduct? Could sleep, for an instant, have closed the eyes of an innocent woman, or could she have enjoyed one moment's rest, after witnessing such a tragedy, and when she knew that the mortal remains of the murdered woman was, at the

moment, within reach of her hand? Such circumstances afford *real* evidence of knowledge and accession to the crime; and no evidence ought to be so satisfactory to a Jury as proof of that description. Then, in what state is the prisoner M'Dougal next morning? She commences with entertaining her company by singing them a song, as sworn to by Mrs Connoway, at a time when she must have been sitting within a few feet of the dead body; and when asked what had become of the old woman, she, in terms the most unfeeling, and language so coarse as forbids my repeating, tells a most gross falsehood as to Docherty's behaviour, and as to her having turned her from the house the preceding night. Thus, she endeavours to conceal the murder, and protect the murderer,—facts which of themselves have even been held to constitute an accession to the deed. But she does not stop here,—she endeavours to bribe Gray and his wife to secrecy; and recollect, I pray you, the nature of the bribe,—£10 per week—a truly enormous sum, recollecting the price immediately paid for the bodies destined for dissection. These witnesses ought, while they live, to thank God for giving them strength to resist the temptation. Had it been otherwise, not only would this crime have gone unpunished, but, who can say but that the hands of these persons might not, ere now, have been imbrued in human blood. Strange as it must appear, that refusal seems to have made little impression on M'Dougal; as you find her and Mrs Hare proceeding, first to Surgeon Square, and then to Newington, on pretence of preventing their husbands quarrelling,—a thing not unlikely at that moment, but, in reality, to look after the price to be got for this body, and to take care that they had a share of the booty. I know that the address of my learned friend will lead them to separate these facts, and, by taking them one by one, to shew that each, when viewed alone, is not sufficient to constitute accession. But this is not the legitimate mode of dealing with circumstantial proof. The whole facts ought to be taken together; and, viewing them in that combined aspect, I humbly conceive that no reasonable doubt can exist as to the accession of this woman to the crime in question.

I now hasten to a conclusion, and fear that, at this late hour, I have detained you too long, for which the anxiety I feel, in regard to this important case, must be my excuse. I now leave it in your hands, under the perfect confidence of a satisfactory result. I know that you are incapable of giving way to any prejudice injurious to the accused; but I am also persuaded that you possess firmness sufficient to do your duty,—that you will not shrink from it from the apprehension that your motives

may be questioned. You have doubtless an important duty to perform to these prisoners; but you owe one no less sacred to the security of the lives of the inhabitants of this city. And without saying more, I now conclude the long, anxious, and painful duty which I have had to perform, from the day when this crime was committed, down to the present hour, by demanding at your hands, in the name of the country, a verdict of guilty against both these prisoners at the bar.

THE DEAN OF FACULTY.—*My Lord Justice-Clerk, may it please your Lordship—Gentlemen of the Jury*—I cannot but very much lament that you should be called upon to listen to me in addressing you on the part of the prisoner, after so many hours of fatigue as you have already undergone, in attending to the great extent of matter into which this trial has run. We have been sitting here, gentlemen, about seventeen hours, in the course of which, with the exception of the discussion of the question of form, you have been listening to the case of the prosecutor. But when you consider that the lives of these prisoners are in your hands, I am sure I need say nothing more to entitle me to your utmost indulgence, while I submit to you the observations which appear to me to be material in behalf of the prisoner Burke, oppressive as I fear it may be to you to hear me, and oppressive to myself to speak to you, on the many details which the evidence embraces. In one observation which was made by my right honourable and learned friend I entirely concur: that if this case is proved, it is a case of the greatest atrocity. Of that there can be no manner of doubt. But, gentlemen, the inference I apprehend is not to be readily drawn, that because it is a case of atrocity; we are, in trying the guilt alleged against the prisoner, to be satisfied with any thing short of clear legal evidence, or are to proceed on mere suppositions, or on that which may amount to no more than mere probability. All the principles of law and justice lead to an opposite inference. Gentlemen, this case may be represented as anomalous and unprecedented in some views of it; but I must beg your attention in the very outset, to this plain view of the matter, that the thing of which this prisoner is accused, is simply and singly *murder*. There is no aggravation, and no other crime or offence charged; and, when therefore it is supposed that this case is of an extraordinary or unprecedented nature, this can only refer to the motive by which it is said the prisoners were actuated in committing the murder. But what does that amount to, but that the motive was a miserable *gain?* There is surely nothing anomalous or unprecedented in this. A vast proportion of the murders of which we hear are committed

from the same motive of *gain*—to conceal robbery, or escape in housebreaking. And what difference does it make on the crime of *wilful murder*, whether the motive be to rob a man of his watch or a few shillings, or to sell his body for a few pounds? The crime is still the same, and it is neither less nor more than wilful murder in either case. Other motives may also exist, such as violation or the concealment of it, and the like causes by which the evil passions of human nature may be directed. But, whatever is the motive, if there be no other crime charged, it is still with the case of wilful murder alone which a jury have to deal; and the single question for their consideration is, whether there is legal evidence or not that the prisoner has been guilty of *the murder* charged against him. The case, notwithstanding, which you gentlemen have to try, is somewhat unprecedented in its nature and character, in a manner which I apprehend requires your most careful attention. The motive for committing the offence which is here ascribed to the prisoner involves in it a peculiar practice or employment which may be in itself a crime, though it is not necessarily criminal; but whether it implies public criminality or not, it involves in it a purpose which is revolting to the feelings of the generality of mankind, and calculated, almost above every other thing, to produce a prejudice in the minds of those that come to consider of the case itself. For, gentlemen, need I say that, when it is imputed to the prisoner that his object was to procure what they are pleased to call subjects for dissection, the very statement of such an object, or such an occupation, stamps a degree of infamy on the individual engaged in it; and you are apt to set it down in the very commencement of the inquiry, that he is a person capable of any turpitude, and to imagine that to prove *him* guilty of any crime, however enormous, requires less evidence than that which you would consider indispensable to the conviction of any other person. The subject of this trial is, besides, one which is universally felt, and has been universally talked of as a matter of horror and detestation; and we come into Court this day upon a charge of wilful murder, with this dreadful source of prejudice stamped on the face of the indictment, in the intent or motive so anxiously set forth in it. I do not know for what reason or purpose it is thus exhibited; but it evidently has the effect of exciting this feeling of prejudice far beyond its legitimate effect, as necessarily involved in a part of the evidence by which the charge is supported. Gentlemen, I point out this to you, in order to press on you the more than ordinary importance in this case of divesting yourselves of all extraneous impressions, and fixing your understandings and your consciences singly on the proper matter of such a trial. I do not doubt the sincerity of my friends in telling you, that they have put the case in the form which ap-

peared to them the best calculated for bringing out the fair merits of the case. I only say, that it demands of the jury more care and caution to distinguish the just impression of the evidence from the impressions inevitably produced by the mere exhibition of the charge itself. I must still farther observe, that the indictment still before you charges the prisoner with no less than three such acts of murder, at different times and different places, and of course on the persons of different individuals. Now, gentlemen, that also tends to increase the feelings of prejudice, because it is calculated to produce an impression, not only that this man had been engaged in that trade of furnishing anatomists with subjects, but that he has been in the habitual practice of committing murder for that end. I do not enlarge on this, because enough was said on it in an early part of the day. But, though you are now bound to confine your attention to the single charge of the murder of Margery Campbell or Docherty, the indictment is still before you which charges the prisoner with two other murders with a similar intent; and it is impossible to prevent the impressions which this must inevitably produce. The great difficulty, therefore, which you have to encounter in this case, is to separate in your minds that which truly is matter of evidence before you from grounds of belief or suspicion received from other sources—from common talk—from newspapers—from handbills industriously circulated, though no doubt reprobated by my learned friends, and all the persons connected with these proceedings. It is a delicate and a difficult task. But it is indispensable to the fair course of justice; and I trust, therefore, that you will meet it with firmness, and throw aside all such impressions, while you come with me calmly to the consideration of the proper case upon evidence alone.

Gentlemen, I need not tell you, that to prove wilful murder against any man requires clear proof. The more atrocious any crime charged appears to be in its circumstances, the jury will require the clearer proof before they find an individual guilty of it. You all know that this is a principle of law: it is a principle of reason and common sense. It is the acknowledged principle of the law of this country, which runs through all its branches. The highest crime which a man can commit is the crime of high treason; the compassing or imagining the death of the king; the *murder of the king*. That is the highest crime known to the law; and what does the law of this country provide in that case? It covers the person accused all over with the protection of the law. It gives him privileges which are not enjoyed, or not universally enjoyed, in any other case. It requires more proof to warrant a conviction than would suffice in any lower offence. When, therefore, my learned friend says that this is a most atrocious case if proved, he gives you a rule and principle of

judgment, universally recognised by the law, that the facts proved must establish the crime and guilt of the prisoner in the very clearest manner. Now, gentlemen, the first matter of fact to which I direct your attention is completely fixed in this case. Though I am aware that it is calculated deeply to injure the prisoner, if he were to be tried by prejudice, it is still a fact, which, in the case, as it truly depends on evidence, is of the greatest importance in his favour. That fact is, that this man has been employed in the business or trade, as it may be called, of procuring or furnishing subjects for dissection. Gentlemen, though that circumstance may excite feelings of prejudice and disgust, divest yourselves of such feelings, and you will then see in an instant, that it is a most important fact in favour of the prisoner, in considering the whole evidence in this case. For, in the *first* place, on that fact I am entitled to say to you that there is nothing wonderful, nothing extraordinary, and nothing to afford the least shadow of a presumption of murder in the circumstance of a dead body being found in this man's house or possession. If you had found a dead body in the house of another person who had never been so engaged, who could give no explanation why it was there, or for what purpose he so had it in his possession, the natural inference would be, if the person was seen alive recently before, and found dead in his house afterwards, that a murder had been committed, and that he was the murderer. But when you attend to the condition of this man, the finding of a dead body in his house proves nothing at all against him, in the proper charge of murder. According to the account that is given you by Paterson, and it could be supported by other evidence, it was this man's trade, in which he was constantly employed by Dr. Knox and others, to procure and sell dead bodies: perhaps we may say that it was his daily occupation, and every week you might have found such a thing in his custody in one form or another. It may indeed be a fact of importance if you have other evidence tending to prove the fact of murder. But by itself, and viewed only in its first aspect, it affords no evidence, and no presumption of murder:—The fact of the prisoner's trade, be it lawful or not, entitles me to say that the mere fact of the body of this woman being found in the house of William Burke, is no evidence, even to *presume*, that he had murdered her; because it admits of a clear explanation, consistent with innocence, from the daily traffic in which he was engaged. Then, gentlemen, in the *second* place, you will be pleased to observe how that matter bears in another way. When you find it proved, that this man was engaged in an employment, which is considered infamous, and which may and generally does involve a crime of a different nature, you see manifest danger to him from the discovery that he is so engaged. There is danger to his person

from popular feeling independent of the law—danger of his being beset in his dwelling—danger of his being attacked in the streets: and thus you have a reasonable and true account at once of all the anxiety he may have shewn to conceal the fact of such a thing being in his possession or within his house. Whether he had procured this subject legally or illegally, he was equally in danger, if it came to be known; consequently it is clear that he had motives for *concealment*, and motives for *false* attempts at explanations, altogether distinct and separate from the supposition that he was conscious of having committed murder. If you will permit yourselves for a moment to separate this matter from any other evidence in the case, which may seem to bear on the charge of murder, you will see at once, how totally insufficient it is to afford any proof of that charge. If there were no evidence as to the manner in which this woman came into the prisoner's house, or of the circumstances which took place there, the mere fact of his having concealed the body or having given false statements to prevent its being discovered—the wavering and inconsistent accounts which he might give after discovery—nay, even inducements held out to prevent disclosure—all such things would admit of the easiest explanation from the fact that he was engaged in such trade; and that there was a plain motive for all of them, independent of any supposition of his having committed murder. Now, gentlemen, there is a *third* observation I have to make as arising from this matter of fact. Gentlemen, I am not standing here to defend the character of William Burke. I will not do so. I have too much respect for your understanding, and my own profession to do so. But after you see what sort of a man he is, and how he is situated, I say, gentlemen, the mere fact of his taking and keeping the body of the person, and using it in a particular manner, after the person had come to death, either by an accidental fall or by violence, not inferring murder, or even by the wilful act of some person, would by no means afford any thing like conclusive evidence, that he was either the murderer or a wilful partaker in the murder. The supposition is perfectly reconcileable with the contrary idea. You have evidence that Burke and Hare acted together in this trade of procuring subjects for dissection, though William Hare, with his usual adherence to truth, chooses to deny this unquestionable fact. You have it proved by Paterson. Now, I put the case to you, that this woman died by intoxication or by accident, or that she was killed in a fray, or killed on a sudden impulse, by this William Hare, without premeditation, or at any rate, without preconcert with Burke; and that *afterwards*, Burke having no *previous* participation, was willing, or was prevailed on to join in making booty of the subject. You may condemn him if you

please—you may say he is destitute of common feeling, if you like; but the question would be, could it be necessarily inferred that he had committed the murder charged? He is not under trial for procuring subjects for anatomists; you see, then, on the whole, the situation in which this man was placed, and that he was in a situation which will account for a variety of circumstances, which, in another case, might be of the most conclusive nature. Gentlemen, I wish to make one more observation of a general nature. You have it proved that all those persons who were in any way connected with this affair, are of the most irregular and dissipated habits; I do not mean Mr. Alston, or the other respectable persons that were examined; but the Burkes and the Hares, the Grays, and the Connoways, &c. appear to be persons of very irregular habits. You find them drinking ardent spirits morning, noon, and night of the same day, to a great extent; and, gentlemen, when you find evidence of such habits as are here proved, in all the persons who are found in contact with the scene of action; and when you then discover, by good evidence, that there was a violent fighting, a complete riot, within the walls of that place where the woman is said to have met her death—Gentlemen, when you find this state of the matter to be by far the clearest thing proved in the case, and then find even more than the possibility of death by accident, or death by violence not premeditated, and which might not have been at all in the act or the intention of this prisoner, I am entitled to call upon you to consider well the evidence by which it is said that the guilt of murder is fixed upon him. He is not indicted on any thing but a charge of cool, deliberate, and premeditated murder. The prosecutor is bound to shew that it was premeditated—that it took place by his act—and was perpetrated in the prepared and deliberate manner described by my learned friend.

Now, gentlemen, I say, and I hope I may be able to prove it to you immediately, that the whole of the prosecutor's case depends on the *socii criminis*—the alleged accomplices in the deed charged. If not from the two Hares, you have no evidence on which you can with the least safety tax your conscience to convict the prisoner. I say, that without them, you have no evidence, either of the *crime* or of the *criminal*. We shall examine the circumstances relied on, a little carefully, immediately. But, gentlemen, before I do so, let me make this one remark, in which I think you will certainly concur. Most certainly if the learned prosecutor had thought that there was evidence sufficient for a jury to convict of wilful murder in this case, without any person being admitted as king's evidence or approver, most assuredly his Lordship would never have thought of permitting any such person to stand before you as a witness this day:—it is impossible that he should have done so:—for observe what sort of a

crime it is that is in question: it is a wilful and deliberate murder. The parties brought before you to be examined, are persons, (according to their account of that matter), who were participators of the whole guilt; and have admitted themselves to be so. Would they be permitted to stand there as witnesses, instead of being placed at the bar of justice, if it had been known that the case could have been made out to the satisfaction of a jury without them? I apprehend not. It is inevitably to be inferred that the whole evidence being known to the prosecutor, and well weighed by him before this course of proceeding was adopted, it was found to be indispensably necessary that no less than two persons who have confessed themselves to be stained with the most enormous guilt (if there is any truth in their statements), are withdrawn from the bar, and presented as credible witnesses before you. I think I am not stating too much, when I say that we have here the best authority for holding, that without the evidence of these persons, it is impossible that there can be a sufficient case against the prisoner. Now, gentlemen, I would request of you here again to fix your understandings to an accurate consideration of the evidence, by making the necessary separation: Be so good as lay aside for the present the testimony of those alleged accomplices altogether. Take the case that they did not exist; that they never spoke a word to you to-day; that they were not here present; or if present, were standing at the bar. In this way only can we see correctly whether there is evidence on which you could be called upon to convict the pannels at the bar. I know it is proved that there was an elderly woman that went into the house of Burke at a certain time—that she probably lost her life in that house—that she was there after she went from the Connoways' into the Burkes' house; and neither shall I trouble you with any discussion of the question, as to the identity of that person, or whether the person that so went into Burke's house was the person murdered, or the person that lost her life. I shall suppose that the person is identified—that the clothes are identified—and that she was the person that lived in the Pleasance, and was afterwards found dead in the surgeon's hall. But then the question is, *first*, on the *fact* of *murder*, and *secondly*, on the person who committed the murder. You must be satisfied of *both* these facts; that the death was by *murder*, and that *Burke* was the *person* who committed it. Now with regard to the fact that a murder was committed, the first thing for us to see is, whether it is sufficiently proved that this woman died by *violence* at all. And I shall take the liberty of saying that it is not proved in a manner which ought to satisfy any jury that she lost her life by *violence*; on the contrary, the evidence that the prosecutor has brought to prove it, proves, I submit to you, the very reverse. For what does it amount to? Gentlemen you have the evidence

of the medical gentlemen, Mr. Black and Dr. Christison. The first tells you that he *will not venture to say that he had a medical opinion at all* from inspection of the body, as to the cause of death, or whether it was by violence or not; he tells you, that having obtained information as to *other circumstances*, which I shall speak to, his private opinion was that it *might* be from suffocation that the woman died; but as a *medical* man he had no opinion whatever upon the subject. Then, gentlemen, what does Dr. Christison say? He swears that he found some marks on the person of this woman, and that none of these marks, and not all of them together, were sufficient to account for death in the ordinary way; but, taking *all the medical circumstances* together, he thinks they might be sufficient to justify *a suspicion* that she died by violence,—that she died by suffocation. The first view of it, then, gentlemen, is, that, *speaking* from medical knowledge, and on *all* the medical facts to be found on the most strict examination recently after death, the utmost he can say is, that they will justify a SUSPICION of death by violence. I need not say that it is not on *suspicion* merely that a jury can proceed. But passing from his medical opinion, Dr. Christison goes to refer to other circumstances. Having heard the whole evidence this day, he goes on to tell you that upon that view of the facts, and combining them with the medical circumstances which he had specified, he thinks it VERY PROBABLE *upon the whole* that she died by violence; and being afterwards asked again, he tells you plainly and clearly, that the *utmost* point of opinion to which he can go, is to say, that upon *all* the facts it is a *probable case* that she died by violence. Why gentlemen he goes a little further, and says that *all the same symptoms might appear from death occasioned by intoxication*; for if the woman came into a particular position, which for any thing you know she well might, if she came in contact with soft substances on her mouth and nose, and various other ways which he specified, her body might exhibit *all* the same symptoms which he found on the body in this case; and yet the death be occasioned by intoxication without any violence whatever. In the trial of crimes, and more especially in capital cases, you know, gentlemen, that it is not strong *suspicion*, and not *probability* in any degree, that affords ground for a verdict of guilty. There must be *clear legal evidence*, producing a decided conviction in the minds of the jury of the actual fact, such evidence as leaves no reasonable ground for doubts. And yet here, in the very ground-work of the case,—in the first element of the *corpus delicti*,—the fact of death by violent means—we have the prosecutor's case, upon his very best evidence, left upon mere *suspicion* in the first instance, and a simple *probability* at last. Now gentlemen, I appeal to you and to your experience, have you ever heard of a case of life and

death—of a trial for wilful murder—in which a jury has been called on to receive conjectures or suspicions in one view, and a merely probable inference in another, as amounting to the evidence which the law requires. I apprehend that you cannot be warranted, upon your oaths, in so serious a case, to proceed on any such grounds. You will always remember, that at present, I am considering the case, putting the evidence of the two Hares entirely aside. Putting them out of the case, you know very little of what passed after the woman left Connoway's about nine o'clock, or half-past it. You know nothing but what you get from them, except the facts stated by Mr. Alston, to which I shall speak immediately. In other respects you have no evidence except upon presumption. Then, gentlemen, I am now entitled to say for the prisoner, upon the evidence, that the woman might (consistently with all that is proved) have lost her life there through intoxication. There are indeed facts proved in the present case sufficient to render it very possible, and even probable that that must have taken place. The direct evidence only proves ground for *suspicion*, or at the utmost a *probability* of death by violence, while it also shews that intoxication might account for all the symptoms. And when we are considering this as a mere supposition, from appearances after death, is it not highly important, that there is clear evidence in this case that that woman had actually participated largely of strong liquors, during the whole day, and truly was in the condition which might without violence have produced the effect? It would be in vain to tell us that Dr. Christison did not smell spirits in dissecting the body; for the fact of her having drunk spirits to a great extent in the course of the day is unquestionably proved: It is part of the prosecutor's case: And therefore Dr. Christison must just add this to the list of cases in which he says there was no perception of spirits by smell, though it was certain that they had been largely received into the stomach. Here also it is certain that this woman did take a large quantity of spirits on that day. Indeed if you believe one word of Hare's testimony, he tells you that she was so drunk that she could not stand—so drunk that she could not rise when down. Then, gentlemen, we have the case established which by the evidence is sufficient to give a probable account of the death of this woman without any violence whatever; and if suspicion or probability will not in any case avail *against* a prisoner, still more clearly must any probable account of the matter, consistent with innocence, be sufficient to meet any such case of mere suspicion and probability against him. But now, in the *second* place; suppose, gentlemen, you got over this first difficulty, and were of opinion that there was evidence that the woman died by some violence, the next question is, Whether there is evidence of *murder*? and of murder by

Burke? There may have been death by violence, and no murder; and there may have been murder, and not murder by Burke. Laying the Hares aside, the case of murder is attempted to be made out by a train of circumstances. There are a variety of circumstances insisted on. The first is, that Burke met with the woman in the shop; that he pretended he was a near relation to her; that he sent the Grays out of the house that night; that the woman was seen in health late in the evening, and that she was found dead next morning; that great pains are taken to conceal the body; that it was instantly afterwards sold; that Burke had gone to Paterson's at 10, and afterwards at 12; that Mrs. Burke offered to bribe Gray and his wife, if they would be quiet: Then follows the evidence of Mr. Alston and Gray. In order to judge fairly of the weight of each of these circumstances, and of the whole together, I must beg of you to suppose to yourself that really and truly Burke did not destroy this woman, and never had such an intention. Assume this for a moment, which is only the common presumption to which all persons accused are entitled; and then one and all of these circumstances admit of the most easy and simple explanation. The fact is, that Burke met this person in Rymer's shop, and as she complained of having had no breakfast, he offered to give her her breakfast. She said her name was Docherty, and it is assumed by my learned friend that Burke asserted that she was a relation of his, and pretended that his own name was Docherty. With deference to him, this is not according to the evidence: The evidence is, that, when she said her name was Docherty, he said that his *mother's* name was Docherty, and she *might* be a relation of his.—Instead of telling her that his own name was *Docherty*, he told her that it was *not*, as it must have been inferred that *his* name was his *father's* and not his *mother's;* and it does appear, that the woman persisted in calling him *Docherty*, even after Mrs. Connoway had told her his name was Burke. The fact is, that his mother's name *was* Docherty, and nothing to the contrary appears. It comes, therefore, to this, that finding her in a miserable state, he proposed what, if fair intentions be assumed, was a mere act of kindness. He offered to give her breakfast; and afterwards offered her a night's lodgings in his own house. Is this a circumstance which, without pre-supposing guilt, leads to anything? If you do not presume an intention to murder, there is evidently nothing at all in it which tends to establish guilt against the prisoner. It is next said that the Grays were sent out of the house. That is explained in various ways; one explanation is, that there was a difference between them and the Burkes; and Mrs. Gray said she supposed, that because it was Hallowe'en, and there was to be a merry-making, they wished them to be out of the house. But what difficulty is there in sup-

posing that he asked them to go out of the house for the very purpose of accommodating this old woman for the night? If you assume good intentions, is there any mystery in this? This was a house which the lower Irish frequented; the Grays had been only three or four days there. It does not appear that they paid Burke any rent for their lodging, and it does appear that he was under the necessity of hiring lodgings for them. It is plain that this very simple circumstance could be explained in a hundred ways without implying a design to murder this woman; unless you can find the facts proved otherwise, by good legal evidence, which lead to that conclusion. It is, in truth, by first assuming that the case of murder is proved by the accomplices, that the prosecutor is at all enabled to draw back to raise up every trifling circumstance as tending to the same result. Without that assumption, they are in themselves of the most innocent nature. But it is next said, the woman was seen in health, and is found dead in Burke's house. This indeed may infer that she died suddenly, or by some violence; but it is not a fact which will prove murder; especially considering the habits of Burke and Hare, unless it be combined with circumstances of a very different nature. In itself it gives you nothing more than ground to suspect that she may have lost her life by violence. Then, gentlemen, the concealment, and the false account given, were all after this woman's death. I shall not dispute, I admit it is quite clear, that Burke then contemplated to dispose of the body to the surgeon. But assuming this, the concealment of the body, in the first instance, was natural from the nature of the trade in which this man was engaged, and from the very purpose imputed to him in this case. In like manner, the false and contradictory accounts given, are all what might be expected under such circumstances. Then the fact of his selling the body next day, proves nothing surely except that, having got into his possession the body of this woman, he followed his trade in selling it; and whatever disrepute may attach to it, such an act does not prove an act of murder. We are next told that he went for Mr. Paterson. My learned friend attached great importance to the circumstance of his having called at Paterson's at 10 o'clock at night. This kind of argument would be very well, if you could assume the fact that he was to murder the woman; but how does this prove any thing as to the fact of the murder, if you do not first assume the intention? This person was in constant communication with Paterson on matters of a different kind; and all that appears is, that he merely called at the door, did not find him, and there was no more of it. Lay aside the assumption, which my learned friend had no right to make in this part of his argument;—and the circumstance is altogether trivial in this view of the question; though it is of importance in another view of it. But, no doubt, he went again

to Paterson's, at 12 o'clock at night, and brought him to the house, when some reference to a dead body was made. I cannot help thinking, that that circumstance bears strongly the other way,—as it is a very improbable thing, that a man, conscious of murder so recently committed, should have brought *a surgeon* to the spot, and asked him to look at the body, so as to expose himself to instant detection. But, Gentlemen, let me say a word on the testimony of Mr Alston, which, I grant, is of considerable importance in the case. As I understand it, however, it utterly extinguishes the whole evidence of Hare and his wife; and shews, that in whatever way the old woman may have lost her life, *they* were giving to you a tissue of mere inventions, on which it is impossible you can place the slightest reliance. Mr Alston says, that he heard a violent riot in this house,—that he went down and listened,—that he heard men fighting, and making a dreadful noise, and blows,—that he heard a woman's voice in the passage, calling murder, and that she was knocking on the outer door;—that he then heard certain extraordinary sounds, resembling an animal suffocating, though he cannot describe precisely what they were. Now, Gentlemen, I do think you will agree with me, that it would be the most hazardous thing in the world, to find a man guilty of wilful murder, upon such slippery accounts as this. According to Mr Alston's account of the matter, he was three or four yards distant from entering the outer door of the passage. The passage is about fifteen feet long, with a turn in it, and there is an inner door; so that there were thus two doors between Mr Alston and the house, and a distance of nearly thirty feet. There were men's voices in the house, and a woman's voice in the passage, exclaiming murder all at the time, and beating on the door; and it is in the midst of this noise and riot, that Mr Alston says that he heard those faint screams, or movements, like suffocation. I apprehend it would be most unsafe, indeed, for a Jury to rely upon this. It might have arisen from a variety of circumstances, which cannot be explained in the case of a person's having been, even though innocently, connected with the death of this woman. I do not mean to say that the circumstance is not of importance for your consideration; but it is very far short, indeed, of the evidence by which a Jury ought to be induced to convict any man of wilful murder.

Gentlemen, I have now gone through all the circumstances on which I understand the prosecutor to rely, and all, I believe, that are to be found in the evidence as affecting Burke. My learned friend did, I believe, mention the representations made by M'Dougal to the two Grays. In the *first* place, I

think, Gentlemen, if you examine your notes, you will find that the testimony of these Grays is extremely confused and contradictory. But taking it as it is, the circumstance alluded to is accounted for, by the situation in which the man and the woman were placed, from being in possession of the dead body, independent altogether of the supposition of murder. I might observe, that what the woman said, is not evidence against Burke; but, at any rate, her anxiety for concealment, and fear from disclosure, are as little conclusive of the case of murder, as the other circumstances on which the prosecutor has founded. And now, having gone through them all, do you put them all together. I know it will be said, that in a proof by circumstances, the proper way is not to consider each fact by itself, but put them all together, having a due regard to the admitted situation of the man—and, recollecting that, in the present view, you have no direct evidence of what took place in the room. And then I ask, whether, upon such slippery and doubtful circumstances, you could think it safe to pronounce a verdict of guilty? I apprehend that you could not. I have not alluded to the declarations. Upon these I shall say a word. In the *first* place, I apprehend that these declarations are of no manner of importance in a case like this, where, from obvious reasons, it is proved that the persons examined must have been desirous to conceal the state of the circumstances in which they were found. There were evident causes to induce them to do so, without supposing consciousness of murder; they have not admitted, but *denied* all accession to the murder. If they had admitted it, it would have been a different thing;—all that my friend gets from the declarations, is, that they had made a false representation of the circumstances; and, in a case like this, I submit that such contradictions are of very little importance.

It is at the sametime deserving of remark, that the pannel, Burke, has been brought to make no less than five declarations, relative to a variety of crimes, enough to perplex the wisest head, however innocent he might be; and if you find inconsistencies and contradictions in them, it is no more than might be expected, and really gives no aid at all to the evidence for proving the charge of murder. But leaving this also to the Jury, and allowing the prosecutor to take the facts altogether, the public prosecutor must be satisfied, that without the testimony of the accomplices to the direct fact, he has no case whatever for obtaining a conviction in such a case. There are even one or two circumstances which lead the other way: The supposition that Burke murdered the woman, and did every thing in his power to conceal it. But did he really pro-

ned as a man would have done, who was conscious of such an act, and afraid of the least approach of any person by whom it might be detected? The first thing is, that at twelve o'clock at night, he, immediately after the woman was dead, went for a medical man,—a surgeon, to come to his house, and asked him to come to look at the body: so says Mr Paterson. He said that he had got a subject there, pointing to the place. Paterson did not see it, having immediately left the house. But, gentlemen, can any thing on the face of the earth be figured more unlikely, than that a man who was conscious of his having committed murder, was to go for a medical man,—a surgeon, to come to the house immediately, where the murder was committed, and ask him to look at the body? Whatever might be practicable at a latter period, the surgeon could then have discovered, with certainty, that the death was produced by violence, and seen the precise cause of it. Therefore, that fact, so far from being against the prisoner, is very much against the inference of guilt. We have another fact of the same kind: We are told that Gray was sent out of the house, in order that this murder might be accomplished. But it is distinctly proved by Gray, that Burke went for him next morning, and brought him *to his house* to breakfast, deliberately and intentionally, knowing that the body was lying in the house at the time. He voluntarily invites and calls upon these people to come into a situation where it was next to certain, that if a murder had been committed, it must be detected. This fact takes away all weight from the circumstance, that the Grays were sent out of the house the day before. They say there was some endeavour to conceal the body, throwing whisky about to prevent the smell, &c. I do not doubt it in the least. However, he does not seem to have been very anxious about that matter, for he desires the woman to put on potatoes, and she goes under the bed to search for them; and at last Burke goes out of the house, the Grays are left in the room by themselves, and then they immediately discover the body. The whole of that series of facts may be accounted for, on the supposition that he was merely taking advantage of circumstances to turn the death of the woman to a means of profit; and that the Grays being probably aware of his occupation, he was under no very great anxiety as to them. But you must suppose that the man was utterly bereft of reason, if, having committed a murder, and being desirous of concealing it, he acted in this manner. He just rushed wilfully into certain detection. It was by his own deliberate act, that these persons were called into his house, in order, as must be assumed, to see the state of it, and

examine every thing that had been done in it. This, at least, has little air of probability.

Gentlemen, before I come to the evidence upon which the prosecutor must at last rely, I must beg of you to observe, that there is still another fact, on which you must make up your minds,—besides death by violence, and that violence murder, before you find Burke guilty. You must be satisfied that *he* is the murderer. You have no evidence how the thing was done at all, if you lay aside Hare and his wife;—it was done within the walls of the house,—no one was present but the Hares, and the two prisoners, if they were both there at the time. But it may have been committed by Hare, without Burke having been concerned in it. Hare says that Burke committed it; but, for any thing that appears in the other evidence, it may have been committed by Hare himself, or any other person; and Burke may not even have been present. According to the evidence, it was half-past nine o'clock, or thereabout, when Hare and his wife, and M'Dougal, I believe, left Connoway's room, and went into Burke's. According to all the evidence, independent of Hare or his wife, the old woman went into Connoway's after. Burke was not there at the time. It is then found that he was away at Paterson's at ten o'clock. Now, gentlemen, you have not a grain of evidence of what took place with this woman from half-past nine o'clock, until you come to the period of twelve o'clock, when Mr Paterson came there. You have evidence of noise in the room;—but where is the evidence that Burke was there at all at that time, or, at any rate, before Alston heard the noise after eleven? It is not in evidence at all, except by Hare; for my friend is in a mistake, in saying that it was at eleven o'clock that the woman was last seen alive. We have no such evidence of that, except the Hares'. But suppose it to be true, that Burke came down there after he had been at Paterson's—still, even this is not conclusive. He was at Paterson's at ten o'clock; and though there is a supposition that he had passed in when the old woman left Connoway's, I cannot hold that to be proved. Then there is a considerable interval between the time that the parties went from Connoway's into Burke's house. Now, where is the evidence that this woman was not killed when he was out of the way at Paterson's? There is no evidence to prove that he was there at that time; it is left under that possibility, that she might have been murdered by Hare in the interval, and the subsequent quarrelling may have arisen from that very cause. It is very true, I do not know that this is the fact. I am not bound to prove the prisoner's innocence;—it is the duty of the prosecutor to fix guilt upon

him, so as to exclude every other supposition. Suppose I make another concession,—suppose Burke was in the room; the murder might have been committed by Hare, in various ways, not implicating Burke: It may have been done in the very riot and fighting which took place: She may have lost her life by sudden and unconcerted violence by Hare, for which Burke was not responsible. It might have been done in another plain way: They were all in a state of intoxication at the time; and it is possible that the thing might have been done at a time when he was not aware: He may even have been asleep, after all the riot was over. Thus, Gentlemen, on the whole matter, if you lay aside the testimony of the Hares, though there may be circumstances of strong suspicion, I submit to you, 1*st*, That there is no good legal evidence, even that the woman died by violence;—2*dly*, That there is no safe evidence of the murder, even if it were held to be proved that she died by violence;—3*dly*, That there is no satisfactory evidence that the murder, if assumed to have been committed, was the act of Burke, or was so committed, as to render him an accessory in the commission of it.

Gentlemen, I am now brought to the consideration of the important question, regarding the testimony of the accomplices. And the question is, whether you can give the smallest credit to these two witnesses? Gentlemen, upon principle, I shall submit to you, that though such witnesses are, in point of law, *admissible*, yet it belongs to the Jury to weigh their credit; and that, in such a case as this, they are entitled to no credit at all. What is it that this man Hare confesses? What is it that he states before you that he has been doing?—That which, if he speaks a word of truth, would infer that he has committed the most infamous crimes that you can suppose a man capable of. The law of the country, Gentlemen, as it now stands, is, that if that man uttered the same words at the bar, which he uttered in the witness' box, he would have stood convicted of the crime of murder, without even the intervention of a Jury. The mere uttering of the fact, would have been all that would have been required; and, on that confession being recorded, infamy would have attached to him, though he had been permitted to live; and no Jury could have been allowed to give him credit. In point of principle, then, I ask you where is the difference? Is he more credible, because he comes before you under the name of a witness, and confesses that he has committed this heinous crime? Upon the same confession at the bar, he would have stood convicted, with or without a Jury. Disability to give evidence must depend on principles of moral reasoning, on

which the individual is held not to be possessed of that sense of truth on which the credit of human testimony entirely rests. But how are these principles changed by the accidental circumstance of the crime, which stamps the infamy, and produces the disability, being *confessed before you* by the witness, instead of its being confessed or proved against him as a culprit at the bar. In every question as to the verity of such evidence, or the moral grounds of belief connected with it, the cases are the very same; and a Jury are entitled to say,—'We will not convict any man upon such testimony;' because this is not a person who has the ordinary principles of veracity; because even the law holds him, by the fact admitted, to be a person who is not to be bound by the common laws of truth, or the sanctions of an oath.

If, again, Gentlemen, you look to the specialties of the case, can you put the smallest faith in the testimony of this man Hare, and his wife? What is there to restrain them from telling the most deliberate series of falsehoods, for the purpose of fixing the guilt on the prisoners, and extricating themselves from the condition in which they stand? Here is a person who tells you, that for the paltry object of a few pounds, he was leagued with another to destroy his fellow creature; and when he is asked if he had ever committed other murders, *declines to answer the question.* This is the person that comes before you this day, and he comes, not with the motive of a few shillings or pounds, but the tremendous motive of saving himself from an ignominious death, which the law would inflict upon him if he did commit these horrible crimes. But he comes also with the hazard hanging over him, that, if he fails to support the statement which he had previously given,—the prosecutor has, at least, two other charges which may be brought against him, and perhaps more, for any thing that I know. But it is enough that he has this constraining motive, to throw this charge of murder upon these prisoners, to save himself from the death which he says he deserves. Where, then, is there any restraint upon him from passing on you the most false inventions? He comes here without one grain of principle, or moral feeling; he is not in a free state, but tied down to make out the case against the pannels, as the condition on which to save himself. Just change the position of the parties, and suppose that Mr Hare was at the bar, and Burke in the witness' box. I do not know what case you might get from Burke or M'Dougal; but nothing could hinder them from making as clear a case against Hare and his wife, totally transposing the facts, and exhibiting the transaction as altogether the reverse of what Hare says it is. I, therefore, submit to you

that from the confessed infamy, and total destitution of principle attaching to these witnesses, you can never consent to put a grain's weight on their testimony. But, gentlemen, even if these witnesses were otherwise entitled to the smallest credit, surely it can only be under the condition, that the testimony which they have given, is free from contradiction, clear, straight forward, and consistent; and not testimony which is contradicted by itself, contradicted by the other accomplice, or contradicted by other and far better evidence in the case. Now, gentlemen, I will say, that I have seldom, if ever, heard two persons, in the situation of these witnesses, present to a Jury a greater mass of contradictions, inconsistences, and plain falsehoods, as are to be found in their depositions. Gentlemen, I have made a list of some of those contradictions, and I will go over them. I do not know that I have taken them in the best order, but you will easily follow and recollect them with the aid of your notes:—You will remember that Brogan swears, that when he came into the house, at two or three in the morning, he lay down *by the fire* with *the two women*, and that Burke and Hare were in the bed. What says Hare to this? This veracious and correct witness is pressed upon it, and adheres to it, that *the two women were in bed*, and that Brogan was sleeping in the *back part of the bed*, behind his aunt, as he is pleased to call her; and the circumstance of Brogan's being at the back of the bed, behind the women, is too remarkable, to admit of a supposition that there was any mistake in it. Now, when we ask Mrs Hare, she partly reverts to Brogan's account, but differs from both. She says, that the women were on the floor, and one of the men was in bed, and the other in the chair. By the one party, both the women were in bed, and Brogan there;—by the other, the two men were in the bed, and the two women, with Brogan, on the floor;—and the third places the women on the floor, with Brogan and one of the men in the bed, and the other in the chair. There is contradiction for you! If they were capable of judgment, and in a situation to give evidence, it is impossible that mistake or misconception, to this extent could take place. Next, Hare says that the moment Burke got above the old woman on the floor, Mrs Hare and M'Dougal escaped *out of the bed*, where they had been. That is flatly contradicted by Mrs Hare. She says she was *not* in the bed,—she was standing by the door,—and that she did not get out of the bed at all. Then Hare says, that at the time this scene was transacted, he was sitting quietly on the chair. What says Mrs Hare? That he is standing by the dresser, at the time she went out of the room with M'Dougal. Now,

this is a very important part of the matter, as you will presently see. Hare swears, that Docherty was so drunk that she could scarcely stand; and that, when she was on the ground, she attempted to rise, and was unable to accomplish it. Mrs Hare will scarcely acknowledge that she was the worse of liquor at all. Here I beg to put to you this alternative:—I will take either of these suppositions for a moment,—either that she was so extremely drunk, as Hare says,—or not. If she was in the state of intoxication described by Hare, then the consequence described by the medical gentlemen might naturally follow;—but if she was not in a state of intoxication, and yet fell to the ground, and was unable to rise, though she attempted it, and nobody prevented her; why, then, is not the consequence inevitable, that she must have suffered from a fall of a very serious nature, which may have produced death as the consequence. Indeed, according to all the evidence they have produced, whether she fell, or was pushed or knocked down, she never arose from the spot where she fell. She was drunk, or she was not drunk; and, in either case, it leaves room for a natural explanation. Then we come to another most important contradiction between them. Hare tells you,—and it is a statement by far too cunning and too clearly betraying the object, to allow of the supposition that he said so carelessly,—that the old woman ran into the passage, and called out murder, while the fighting was going on. What says Mrs Hare to that? She says that the old woman was *never out of the room* at all. She says that the *door was never opened.* Here there is a direct contradiction in a most important fact of the case. But, gentlemen, this carries forward to another still more important; for Hare said that the prisoner *M'Dougal went twice into the passage, and brought back the old woman,* when she was crying murder. If you believe Mrs Hare, this is a downright falsehood; for the question was put plainly to her; and she swears, in the *first* place, that the old woman never was in the passage; and, in the *next* place, most pointedly, that M'Dougal never brought her back. What are you to make of such evidence? You must be asked to believe either the one or the other. But I think your answer must be, that you will believe neither. Then we went on, during the whole day, gentlemen, in the proof of the fight between Burke and Hare, which is supposed to have begun the riot, which terminated between eleven and twelve, according to the account given by Mr Alston; and they were all quiet in this room afterwards, with the exception of the coming in of Paterson quietly. So, at least, Mr Hare tells us. But when we come to Mrs Hare, we

find that there is a second fight, later in the night; that the two men fought a second time, and were stopped with great difficulty. But, gentlemen, how does this tally with the evidence of Hare otherwise? He tells you that after Paterson had been there, he lay down in the bed, and he lay there constantly; and at last fell asleep, and *did not awake till seven or eight in the morning.* Not a word of this second fight; he was in a quiet sound sleep during the whole time. Therefore, gentlemen, you see you can place no reliance either on the one or the other of these witnesses. You will next find, that there is a most important statement made by Hare, that the old woman was brought into Burke's house so early as nine o'clock on Friday morning. It is in evidence, if any thing can be relied on, that that is not true; for it appears by Connoway and Lawrie, both of whom concur precisely in stating it, that the first appearance of the old woman in the house, or in any place near it, was about two o'clock of the day; at which time Mrs Connoway says that she was sitting by her fireside, and saw Burke followed by an elderly woman whom she never saw before, go past into his house. Mrs Lawrie was sitting with her, and precisely concurs in that statement. Gentlemen, it is not without importance, because you will recollect, that by Hare's testimony, he pretends that he was sent in the *fore part of the day* to see how things were going on; and when they call three o'clock the *afternoon*, we must understand the early part of the day to be before twelve. But he tells you that he was there about eleven o'clock; that Burke sent him down to see if the old woman was there; that is quite clear. But all this is contradicted by good testimony, which there is no resisting. Gentlemen, I come now to a state of facts which I hold to be of the very utmost importance in this case; and that is what is given in the testimony of Mr Alston, compared with the statement of Hare and his wife. Look to Mr Alston, and see whether he confirms their testimony in material points, or whether he does not contradict it most essentially. It will be admitted that such testimony is of no value, if it be not *confirmed.* Now Alston says that he heard the cries of murder, by a very strong female voice. Hare expressly swears that the old woman went into the passage and called murder, and that no one else ever called murder:—that is the first point. Mrs Hare says, that there was no call of murder, except within the room. Now, in the *first* place, Mr Alston is positive that that cry of murder, and the knocking on the door, came from the passage, and that the knocking was on the outer door of the passage; that he tried afterwards, and found that it could not have come from the inner

room, but must have come from the passage. Is not this a most material point? Mr Alston expressly swears that the cry of murder was made by a voice *totally different* from that from which the *moaning or choking* noise proceeded; and the voice was *extremely strong* for the voice of a woman. This being the case, the cry of murder must have been made by some one else, if Alston is to be believed; and of that, I suppose, you entertain no doubt; it must have been by some other person than the individual suffering. If you are to put the least faith in Alston's statement, he first heard the noise of fighting, and cries of murder, and the knocking on the door; and it was in the midst of this, that he heard the choking sound. Look at Mr Alston's testimony, and you will find that it is so; and as he heard the cries of murder before this sound, so also he swears particularly, that he heard the cry of murder *after this sound;* which, if it has any weight or bearing, must be supposed to have been the sound of the dying woman. It is therefore impossible that the cries of murder to which Alston speaks, could have come from her, for the sound of the voice was peculiarly strong for a woman. The thing is absolutely and morally impossible. But, gentlemen, even this is not all; Mrs Hare says she went into the passage with M'Dougal; that she is *quite positive* that there was *no knocking on the door by any person whatever*. Now, if there is a grain of truth in Mr Alston's statement that touches the present case, it is, that he heard rioting, and the choking sound; and, at that very time, there was a person calling murder in the passage, and beating violently on the outer door. Is Mrs Hare then a credible witness? If you believe Mr Alston, there is complete contradiction, both of her and her husband, in the most important points; and not only so, but it is such contradiction as to be absolutely fatal to the whole testimony, and destroy the whole connection of the story. The account that Hare gives, is, that there was a fight between the men,—that the women tried to separate them,—that the old woman called out murder, and then attempted to separate them,—and was pushed over,—and then all was quiet;—for Hare says expressly, that after he was thrown on the bed the second time, and before Burke had got above the old woman, the fray ceased; he was perfectly quiet, he was sitting quietly in the chair, and he tells you, at last, he did not utter a word,—all was quietness in that moment, and there was no call of murder, no moaning, no going into the passage, and no knocking upon the door. Mrs Hare again gives a different account of it; only clenching the matter with this, that she places herself in the passage during the time the murder was going on, and then asserts there is no call of

murder, and no knocking. But Mr Alston's account is perfectly at variance with all this,—he went down,—the woman came into the passage, called murder repeatedly, and police, and beat violently upon the door; and, while that is going on, he heard the choking sound, which, he thinks, might have proceeded from the old woman dying; but the noise does not terminate for a very considerable time afterwards; for you remember, that after Mr Alston heard that, which he thought enough for rendering it necessary for him to do something, he left the door, and went up the street in search of the police; and thinking, after he was in the street, that the quarrelling and noise had abated, he went down again, and then found all quiet. Now, gentlemen, this statement, taken altogether, so far from coinciding with the account which the Hares give, is utterly destructive of it; and shews, that whatever may be the truth of the case, their story is a tissue of inventions; and whatever account is to be given of the manner of the old woman's death, you have not got it from these witnesses. When you have witnesses so situated, bringing infamy with them wherever they come, and find them involved in such numerous and palpable contradictions, I ask, can you put the smallest faith in one word that they have said? I humbly conceive that you will not; for you can scarcely find one single material fact asserted by the one, which is not contradicted by the other. And yet this is the evidence on which the case rests. It is very true, that these infamous witnesses agree in one single point. They have invented a story, and a method of the murder, which they impute to the pannels in this case;—in that they agree, but in nothing else. This is exactly where a combination of false witnesses will in all cases concur; and the falsehood of their testimony is to be detected, by the flat contradiction in the material connecting circumstances. In the present case, it is to be discovered, not in one instance, but in many essential points throughout their testimony: Their concurrence in the general assertion, and their subsequent contradiction in all material particulars, shews the way in which they are connected in a false story, and the impossibility of holding to it. Gentlemen, there is still another positive contradiction:—Hare says he got no money from the assistant of Knox. Is it not proved by Paterson that he did? But not only so: Does not Paterson swear that Hare as frequently acted as principal as Burke did? and he (Paterson) divided the money, to prevent disputes. Surely you will believe the testimony of Paterson, in opposition to that of this man Hare.

Gentlemen, I have very nearly done, and will relieve you in a few minutes. I come to the result. Perhaps it may be ima-

gined, that because this woman has lost her life, and there is no clear account of the manner of her death, it may, therefore, be unavoidable, to hold Burke guilty of the murder, as being the most probable account of it. But, gentlemen, I apprehend, that this would be no safe rule of judgment. The case may not be explained. It may be *left in mystery;* and yet there may not be ground for *legal* conviction. You must have credible legal evidence, such as to leave no reasonable or fair doubts of the pannel's guilt. I don't say, gentlemen, that it is to be pushed so far, as to exclude every mere possibility; but you must have such evidence, as to leave no reasonable doubt of the guilt of this man. But there is no difficulty, in any view, of accounting for all that appears. What, if that ruffian, who comes before you, according to his own account, with his hands steeped in the blood of his fellow creatures, breathing nothing but death and slaughter:—What if that cold-blooded, acknowledged villain, should have determined to consummate his villainy, by making the prisoners at the bar the last victims to his selfishness and cruelty? What is there to restrain him? Do you think that he is incapable of it? It is impossible for any man that heard the trial to think so; and if so, what difficulty is there in accounting for the whole matter? The murder might have been committed by him, and all the means prepared by him, for exhibiting the appearance of circumstances to prove it against Burke. It will not do to say that this is a case of proof by circumstances; and, therefore, any probability, or any suspicion, is enough. True it is, you must determine on the weight and conclusiveness of a proof by circumstances. But it is still by *evidence*, and not by mere conjectures, suspicions, or probabilities, that your judgment can be guided. You must have *legal evidence* in this, as well as in all other cases, that the crime was committed, and that the prisoner was the person who committed it. Gentlemen, if it were otherwise, what would the condition of any man in this country be? If a man's life, or liberty, or character, were to hang on the breath of such witnesses as Hare and his wife, what security could any man have for his existence in society for a single hour? It is the easiest thing possible for such a base villain to destroy the life, or the condition, or the happiness of any man.

The principles and rules of evidence, are among the most sacred rights of the people of this country: They have been much insisted on by all the best lawyers and judges, who have had to deal with such trials;—and any violation of them, under the influence of feeling, would break down the securities under which we all live in safety. I trust, therefore, that in

this case you will do your duty to your country, and to the prisoner; and that, without clear legal evidence of his guilt, you will not convict him of the dreadful crime with which he is charged.

Mr Henry Cockburn.—*My Lord Justice-Clerk,—Gentlemen of the Jury.*—I have the honour to address you solely as counsel for the female prisoner; and considering the hour, I will not hasten, but *hurry* over, the facts and the views upon which I feel the firmest conviction that you can pronounce no verdict, so far as she is concerned, but one that will declare that the charge against her has not been proven. In stating these facts and views, I shall assume, (though in the face of the admirable address which you have just heard, I cannot admit),—1*st*, That there was a murder committed; and, 2*dly*, That it was committed by the prisoner, Burke. Still I maintain, that there is not sufficient credible evidence to convict this woman. And if you knew how to interpret the pleadings of counsel as well as we do, you would have seen perfectly well, that the Lord Advocate himself feels that there is a most material difference between the cases of the two pannels.

It is not alleged that this woman was a direct actor in the murder. The case is only attempted to be made out against her, by saying that she was what our law terms *art and part* of it; which, in this case means, that she had such accession to it, before and after the fact, that the legal guilt of it was truly her's as well as his. This makes it absolutely necessary that we should have some idea of the nature of that accession which will involve one, who is not a direct actor, in the guilt of the primary offence; and, on this subject, I am glad that I can instruct you in much clearer and more authoritative language than any that I could employ of my own. *First*, as to the case of accession *before* the fact, Mr Baron Hume says, page 271 of his first volume,—'That if the assistance is indirect only, and remote; this, *though accompanied with the knowledge in general, of the actor's malice and evil design, is not a warrantable ground of conviction.* Put the case, that John reveals to James his purpose of revenge against a certain person, their common enemy, who resides at a distance; and that *James lends him a horse for the journey, or furnishes him with money at his request, to carry him to that quarter of the country.* Some weeks after, James is informed that the person in question has fallen; but as for the manner and circumstances of his death, these he only learns through common fame, after the thing is done. Though

'highly blameable in the part he has taken, he is not however 'punishable capitally, as art and part of the murder.' Then, with respect to accession *after* the fact, he says, (page 277), '*to assist in concealing the dead body; to harbour the actors, 'and help them to escape; to rescue them from the Officers of 'Justice; to bear false witness for them on their trial; or to 'persuade others to do so, or to suppress their testimony against 'them*: All these are, doubtless, immoral, and criminal acts, 'and may naturally give rise to a suspicion against those who 'so far forget their duty, of a deeper concern in the deed; 'but they are no part of the history of this murder: Nay, 'they do not even necessarily infer an approbation of it; '*since they may be done out of affection only, or compassion for 'the actors*, to relieve them of the consequences of that which 'cannot now be remedied or undone.'

These principles are illustrated by a case reported by Burnett, *(p. 270)*, which, in some particulars, bears a remarkable resemblance to this one:—A woman became the mother of an illegitimate child. A man of the name of Smith offered this child to Taylor, a medical student, for dissection. Taylor agreed to take it, and went to a garden to get it. On coming there, it was found that the child was not dead. On this, Smith, *in Taylor's presence*, killed the child, which *Taylor then took away*, and *concealed*, and *refused to give any account of*. He and Smith were tried for the murder. Smith was convicted; but Taylor was acquitted, on the ground that *presence*,—*taking away the body*—and *concealing* it, were not sufficient acts of accession to justify a conviction for murder,—even though these acts were apparently committed by the person from whom the reward of the murder was to proceed. This was in 1807, and the learned author seems to approve of what the Jury did.

Now, what is the history of this woman's connection with this crime? The general features of it are not disputed. Both of the prisoners state, in their declarations, that 'they were 'never married,'—by which they plainly mean, that no regular marriage ceremony was ever performed between them. But the relation of husband and wife may be contracted by the law of Scotland, without this,—by merely living together as married persons; and, it is clearly proved, that these two have been living in this manner for nearly ten years; nor has there been any attempt to prove the existence of any legal impediment to their being thus married, by conjugal cohabitation. In all probability, therefore, they are married,—though none of them may know it. But, at any rate, in a moral sense, she was as completely under his influence, as any wife could be to any husband. Great allowance, therefore, must be made in judging

of her conduct, from the controul which he may have exercised over her; and for the interest which she may naturally, and most properly, have had in concealing her husband's crimes. For it is impossible to shut one's eyes to the fact, that this husband was a professional resurrectionist. His trade consisted in supplying anatomical teachers with subjects; a trade which, when conducted properly, is not only lawful, but absolutely necessary. The remains of mortality form the materials of that science, by which the sufferings of mortality are to be alleviated, or its date prolonged. But however necessary this employment may be, there can be no doubt that it is one which necessarily corrupts those who are engaged in it. It is shocking in itself;—it is generally conducted in violation of law;—and it must always be conducted by a disregard of the most sacred and reverential feelings of our nature. So that, in judging of her delinquency, she is fairly entitled to have her proceedings weighed in reference to the situation in which she acted. She was the wife of a person who had a professional connection with dead bodies, and with whom no woman could live, without seeing many things, which are better imagined than told. A thousand circumstances may concur in the life of such a woman, even where she is perfectly innocent, any one of which would be fatal to the idea of innocence in an ordinary case.

Under this man's roof a murder is committed. But, in the *first* place, it is not even alleged, that the woman was directly guilty of any part of the violence used. It is not asserted that she ever touched the old woman, or instigated any body else to touch her. In the *next* place, it is proved that she fled from the place where the murder was perpetrated. She and Mrs Hare both left the room,—both alarmed; and Mrs Hare described herself as *powerless*. They never returned till the body was disposed of. I should hold, gentlemen, that *in the case of a wife*, this refusal to be present at the commission of the crime, was nearly enough of itself,—not to make her innocent,—but to save her from the consequences of murder. But M'Dougal did more. It was proved by Mr Alston, a most respectable and accurate witness, that he heard a person striking on the outer door, and calling out, with a female voice, '*Police—Murder.*' He was quite positive that this was done by a female. Now, who could this *possibly* be, except the prisoner? It certainly was not the old woman, because Alston swore, that when these cries were uttering, he, at the same moment, heard her dying sounds, which he described as the stifled moans of an animal suffocating. He was positive that these two sounds were heard at the same time.

This excludes the possibility of the cries of alarm having proceeded from the woman who was killed;—and they certainly did not proceed from Mrs Hare,—because that witness did not pretend that they did. There was nobody, therefore, from whom they *could have possibly proceeded*, except from M'Dougal, who was the only other woman there.

Now, if you believe these facts,—and unless you believe them, the prosecutor has no case, for they are proved by his own best witnesses,—I apprehend that the accession of this woman is infinitely too slight to warrant her being treated as guilty of the principal offence. She was in the house,—because it was her husband's. She was silent after the crime was done,—because even Mrs Hare told you, that she did not think it was natural to expect that a wife would betray her husband. But as soon as she saw what was going to be done, she fled in horror, and gave all the alarm that she could.

In this situation, let us see what it is that the prosecutor relies upon. And let us, in the *first* place, consider what sort of a case is made out against her, *independently of the testimony of the two accomplices*. This will enable us to see distinctly, how much of the prosecutor's case depends principally, or entirely, upon that most suspicious evidence. It will be found, if I am not much mistaken, that there is *no case whatever* against the prisoner, except what resolves, ultimately, into the testimony of these accomplices; and, if this be true, her conviction is impossible.

Instead of going through the proof in detail, it will be equally fair, and much shorter, to select the principal circumstances on which the prosecutor seems to rely; and to consider what they amount to. So far as I have been able to discover, they seem to consist merely of the following particulars:—

After the old woman was in the house, M'Dougal told Mrs Connoway to look after her, as there was nobody else in the house, and she might go out. The prosecutor seems to consider this as a proof, that she was aware of what was intended to be done in the evening, and wished to prevent the victim from escaping. It rather seems to me, that her speaking to Mrs Connoway at all upon the subject, is a proof that she was then ignorant of her husband's designs;—and seeing that he had brought a stranger and a beggar to the house, I cannot perceive any thing of the slightest consequence, in her telling a neighbour, when she herself was going out, to look after the house.

It was next urged, that after the crime had been committed, the prisoner gave a false account of the transaction. Two examples of this have been specially founded upon. The import

of one of them is, that she accounted for the old woman next morning, by saying that she had got troublesome during the night, and had been kicked out of the house. The import of the other is, that she accounted for certain appearances, to Mr Fisher, the Lieutenant of Police, by saying that a woman had lain in in the room; that the old woman was still to be seen,—and had apologized in the Vennel, for her misconduct during the night. I have no doubt whatever, that the whole of these statements are false. I admit that they were mere inventions,—fallen upon to conceal the crime. But this is not only their explanation, but their defence. She was aware of the suspected, or the guilty, trade which her husband was engaged in; and I have not a doubt that she was obliged to resort to similar deceptions every week. It was her misfortune to live in a situation in which, even when there was no idea of any thing like murder, she was habitually obliged to make false statements to account for the possession of dead bodies, or to avoid the suspicion of having them. And, allowing that these falsehoods were invented in consequence of her knowing that the murder in question had been committed, they amount to nothing more, than that the deed being done, she *concealed* it;—a proceeding which might afford strong evidence against any body else, but which affords nothing conclusive against a near relation. It may be wrong;—but where is the son who would not conceal the guilt of his father? And, of all relations, how can it be expected that the wife, whose interest, as well as her affections, are involved in his, is, merely for the sake of justice, to become the betrayer of her husband?

Then, it has been held out as decisive againt her, that when Mrs Gray mentioned the discovery of the body to her, she offered her money to be silent, and that her concealment would be worth £10 a-week to them; adding passionately, '*My God, how could I help it?*' Her scene with Mr Gray, though founded upon separately by the prosecutor, was exactly of the same kind. She fell upon her knees to him, and implored him not to interfere. Now, in the *first* place, though the body had been found by this time, it had not been ascertained to have been murdered; and there is not one thing that she did, or one word that she spoke, which might not have happened exactly as it did, if a body, though innocently come by, had been found in the house. She would have been equally injured in her circumstances, and equally urgent against publicity, although nothing could have been said against her, except that there was a subject under her roof. But, in the *next* place, assuming that these were the expressions of a person conscious that a murder had been committed, and in horror

for its disclosure, they are accounted for by the observation which I have already so often been obliged to make, about the natural tendency which she had to hide the delinquency of her husband Does it go far to implicate a wife in a crime committed by her husband, that she offers money for its concealment; or, on her knees, implores a probable discoverer to be silent?

The prosecutor was farther at the pains to call your attention to the fact, that next night she followed the men to Newington. I cannot think it worth while to detain you for a moment on a thing so utterly frivolous. Mrs Hare, who went there also, says that they went there lest the men should fall a fighting again. But whether this reason was the true one or not, it is utterly absurd to set up this circumstance as of the slightest importance either way. If the prisoner had no accession to what was done on the first night, it is not worth while inquiring what she did towards the disposal of the body the night after.

I believe, gentlemen, that if you will ransack both your notes and your memories, you will find no material circumstances, independently of those mentioned by the accomplices, against the female prisoner. Before coming to the testimony of the accomplices, I should wish you to ask yourselves, whether these circumstances form sufficient evidence against her? I apprehend that they not only don't form *sufficient* evidence, but that they form absolutely no evidence at all. I don't see one circumstance which might not have been expected to occur, although it were certain that this woman was quite innocent of all accession to the murder, in consequence of the two facts, that she was in the situation of wife to a person whose trade she could not disclose, and whose crimes she was tempted, and perhaps bound, to conceal. Accordingly, the prosecutor *concurs* with us in thinking, that without the accomplices, he has no case. His Lordship has pretended, indeed, to argue otherwise. But his own conduct establishes what his real conviction is. It is always the duty of the public prosecutor to bring the guilty to trial when he can. He has no right to take culprits from the bar, and place them in the box unnecessarily; and, therefore, the very fact that an accomplice has been made a witness, is a proof that, in the opinion of the public accuser, he could not do without them. If the prosecutor's statement be true, these two accomplices were the property of the gibbet. Why, then, has justice been robbed of their lives? Because the Lord Advocate tells you, that their being made witnesses, was '*a necessary sacrifice.*'

Both of the parties, then, are agreed, that you cannot convict here, except upon the testimony of these associates. Now, in so far as M'Dougal is concerned, this brings the matter to a very simple and intelligible issue. I hold these witnesses, who are thus represented to you, by the public prosecutor, as absolutely indispensable, to be not only unworthy of credit, but I hold them to be so abominable, that the necessity of claiming credit for them, pollutes all the other evidence in the case. I shall explain immediately what I mean by this. But, in the meantime, *let every word that they say be assumed to be true.* This assumption may be fatal to the other prisoner, because they say that he committed the murder with his own hands. But what is the import of their evidence, holding it all to be correct, against M'Dougal? The prosecutor himself has only been able to select two circumstances in their testimony, as decisive against her.

The first of these is, that in the forenoon she talked of her husband having got a *shot* in the house for the doctors. The Hares explain that they understood by this phrase, that a person was secured to be murdered for dissection. Now, although nothing can be more atrocious than this, I don't hesitate going up to it fearlessly, and without flinching; and, I maintain, that it proves nothing, except that she was aware of the intention to commit murder, and that she did not disclose it; and that this, however guilty it may make her, does not render her to be convicted as accessory of that murder. *To know of an intended murder, and to conceal it, is not, in law, equivalent to being the murderer by accession.* I have read you authoritative statements to this effect, from our most learned and practical criminal lawyers; and although there had been no authority on the subject, I should submit with confidence to any Jury,—who are always the judges of the degree of accession that is necessary,—that the failure, by a very near relation, to disclose an intended crime, is not much worse than its concealment by that relation after it is committed. Although, therefore, there be something inconceivably horrid in the very existence of such a phrase,—you are not to be misled by that circumstance; which, unquestionably, does not place this woman in a worse condition than she would have been in, if she had admitted in her declaration, that she knew what was to be done that night. Such an admission, whatever effect it might have had as a part of a circumstantial case, certainly would not, of itself, have involved her, legally, in all the consequences of that which she was aware of, and did not reveal.

The other circumstance is,—that when the crime was about to be actually perpetrated, *she did not interfere to prevent it.*

What I have just been saying, disposes of this circumstance also. If she could conceal her knowledge of the crime, without being thereby guilty of it, of course, she is equally free of this guilt, although she did not interfere to obstruct it. But the true answer to this circumstance is,—that, in point of fact, she did interfere. She not only fled, but gave that alarm which was mentioned by Alston, and which I defy you to account for, except on the supposition that it proceeded from her.

This is all that is sworn to against her, even by the Hares. So that, assuming the whole of the prosecutor's evidence to be credible, the sum and substance of her guilt is, that *she first knew of the crime and did not disclose it*,—and that then, *after it was perpetrated in spite of all that she could do, she not only denied it, but invented false stories to hide it.* The knowledge of it before-hand, and the concealment of it afterwards, constitutes the whole of her guilt in this matter. That that guilt is great, cannot be denied. Morally, perhaps it is equal to murder,—in law, it is certainly not much beneath it. But still it is beneath it.

But really, gentlemen, we give the prosecutor a most unnecessary and unjust advantage, when we talk of the credibility of these his necessary witnesses, and allow them to work up every circumstance according to their own pleasure. I cannot form the idea of any Jury's being satisfied with *less* evidence that what the accuser thinks indispensable. Our learned friend who prosecutes here, has demonstrated by his conduct, that he is satisfied that you ought not to convict without the evidence of the associates; and thus we are absolutely driven to consider what credit is due to those witnesses. If you shall agree with me in thinking that it is an absolute sporting with men's lives, and converting evidence into a mockery, to give the slightest faith to any thing that these persons may say, then we have the authority *of the public accuser himself*, for holding that you must acquit. Now, on what does these witnesses' claim to credit, rest? One of them is a professional body snatcher; the other is his wife. So that, independently altogether of the present transaction, they come before you confessedly vitiated by the habits of the most disgusting and corrupting employment which it is possible to be engaged in; and one, of which the chief corruption arises from its implying, that he who practises it, has long been accustomed to set law, feeling, and character, at defiance. Then they both confess their direct accession to this particular murder; a confession, which, if it had been made at the bar, would have for ever disqualified them from giving evidence in any Court of

Justice. Not having been made at the bar, they are admissible. But since they have made the very same confession in the witness' box, their credit is as completely destroyed in the one case, as it would have been in the other. Hare not only acknowledged his participation in this offence, but he admitted circumstances which aggravated even the guilt of murder. He confessed that he had sat coolly within a few feet of the body of this wretched woman, while she was expiring under the slow and brutal suffering to which his associate was subjecting her. He sat there, according to his own account, for about ten minutes, during which her dying agonies lasted, without raising a hand or a cry to save her. We who only hear this told, shudder; and yet we are asked to believe the man who could sit by and see it. Nor was this the only scene of the kind in which they had been engaged. The woman acknowledged that she '*had seen other tricks of this kind before this.*' The man was asked about his accession to similar crimes on other occasions; but, at every question, he availed himself of his privilege, and virtually confessed, by *declining to answer*.

I know very well, that in spite of all this, they are admissible witnesses. But *why* does the law admit them? Why, just because, after they are admitted, it is the province of you, Gentlemen, to determine how far they are to be believed. You are the absolute monarchs of their credibility. But, in judging of this, do not be misled by what Juries are always told of those who turn king's evidence,—that they have no interest now but to speak the truth. In one sense, no man has any interest but to speak the truth. But it is notorious, that there is nobody by whom this is so universally forgotten, as by those who make a bargain for saving themselves, by betraying their associates. These persons, almost invariably hurt the interests of their new master, by the excess of their zeal in his service. They exaggerate every thing;—partly from the desire of vindicating themselves, and partly to merit the reward for which they have bargained. And you will observe, that in this case, these persons stand in this peculiar situation, that so far as we know, they are still liable to be tried for similar offences. There are other two murders set forth in this very indictment; one of them committed in Hare's house; and if we may judge from what these persons say, they have been engaged in other transactions of the same kind. They came from the jail to this place to-day; and they are in jail again. Do you think it is very improbable, that when coming here, they should feel, that if this prosecution failed, public indignation would require another victim, and that nothing was so likely

to stifle further inquiry as the conviction of these prisoners? The worst feature, perhaps, of their evidence is, that it is necessarily given under the feeling of this *subsisting* interest.

The prosecutor seemed to think that they gave their evidence in a credible manner, and that there was nothing in their appearance beyond what may be expected in that of any great criminal, to impair the probability of their story. I entirely differ from this; and I am perfectly satisfied that so do you. A couple of such witnesses, in point of mere external manner and appearance, never did my eyes behold. Hare was a squalid wretch,—on whom the habits of his disgusting trade, want, and profligacy, seem to have been long operating, in order to produce a monster, whose will, as well as his poverty, will consent to the perpetration of the direst crimes. The Lord Advocate's back was to the woman, else he would not have professed to have seen nothing revolting in her appearance. I never saw a face in which the lines of profligacy were more distinctly marked. Even the miserable child in her arms,—instead of casting one ray of maternal softness into her countenance,—seemed, at every attack, * to fire her with intenser anger and impatience; till at last the infant was plainly used merely as an instrument for delaying or evading whatever question it was inconvenient for her to answer.

It is said that they are corroborated. Corroborated! These witnesses corroborated!!—In the *first* place, I do not understand how such witnesses admit of being corroborated. If the prosecutor has a case without them, let him say so. But if he has not,—if something material must depend upon these witnesses,—it is in vain to talk of corroboration; because, in truth, the thing to be corroborated does not exist. You may corroborate a *doubtful* testimony; but the idea of confirming the lies of these miscreants, is absurd. The only way to deal with them, is to deduct their testimony altogether. It is like corroborating a dream. The fiction and the reality may possibly be both alike; but this accidental concurrence does not make the one stronger than the other. But, in the *next* place, instead of being corroborated, there probably never was a case where suspicious evidence had the death-blow given to it by so many palpable contradictions. I won't attempt to go over these; because I will not impair the force of that most admirable analysis of the evidence which was given by my learned friend, the Dean. He collected—and contrasted—the various particulars in which Hare and his wife contradicted each other, and in which both were contradicted by all the credible evidence in the case. If

* The child was very ill of hooping-cough.

you, Gentlemen, can get the better of that fair and powerful contrast, you will do more than I can, and may convict;—if not, you cannot. My impression is, that these witnesses—who confessedly need corroboration—have not only not obtained it, but have been met by inconsistencies, sufficient to have cast doubts on testimony otherwise pure. But the simple and rational view for a Jury to take, is, that these indispensable witnesses are deserving of *no* faith in any case; and that the idea is shocking of believing them, to the effect of convicting in a case that is capital. The prosecutor talks of their being sworn! What is perjury to a murderer!—The breaking of an oath to him who has broken 'into the bloody house of 'life!'

His Lordship's last appeal is to the prisoners' declarations. As usual with our public prosecutor, he has studiously gone through these parts of the proceedings, and has culled every statement, and every word, which could be made to bear against the accused; and concludes, that so much falsehood could not have been reared by any innocent man against himself. I have not the slightest doubt that all this was most fairly done, and I only differ from his Lordship as to the result. These miserable declarations are always the last refuge of the prosecutor in a doubtful case; insomuch, that whenever Juries see that they are much relied upon, they may, from that one fact, be perfectly certain that the accuser is uneasy about his other evidence. You are aware what a declaration is. A person accused is taken, generally under all the agitation created by the first suspicion, into a room, where he finds a Magistrate, and a prosecutor, and two Sheriff's-officers, for witnesses; and there, deprived of all assistance or advice, he is asked to account for every circumstance, whether real or supposed, which seems to render his conduct suspicious. Happy is he if this operation be repeated only once,—twice,—or even thrice. He is liable to have it renewed day after day,—*even after his committal for trial*, till his declarations, as here, may amount to five or six; and all this matter is accumulated against him, for the day of trial, when it is critically examined, and brought elaborately forward to fill up all the chinks of all the rest of the evidence. I assume every thing to be quite fair on the part of the Magistrates and of the accuser. I know that the man is always warned not to criminate himself; and I know that he need not answer unless he likes; but I also know, that if he does not answer, his very silence is invariably construed against him; and that, although truth is always the safest course, it is one of which the safety is not always seen, even by innocent men. There is an irresistible temptation to account for present ap-

pearances, which makes either silence or truth extremely rare. A man of great firmness, or of great experience in such scenes, may have sense to hold his tongue, or courage to speak the truth, the whole truth, and nothing but the truth;—but, a man of any weakness, or who sees that he has been caught in ugly circumstances, and who, from his very consciousness of innocence, is naturally burning for immediate liberation, has recourse, almost to a certainty, to any statement, whether true or false, which seems to be convenient at the moment. He thinks of nothing but the present instant, and never dreams of the curious web that is to be weaved round him, out of his own declarations, at his trial. Whether this accounts for the fact or not, I cannot say; but I hold it to be an unquestionable fact, that the declarations of the innocent are very nearly as false as those of the guilty. I have no doubt, therefore,—though I must confess, that I have not been at the pains to study them,—that the declarations in this case are crammed with inaccuracies, and probably with lies. You, of course, will give what effect to this you think proper; but I submit to you, that there never was a case in which the circumstance was of less weight. Declarations are great favourites with accusers; but I have long observed a growing disregard of them on the part of Juries; and they are particularly useless in any question like this, where the maker of them, though he may be innocent of the crime for which he is tried, was unquestionably guilty of other crimes which made truth equally inconvenient.

I have only, in conclusion, one other word to say to you on a subject which has been often alluded to from all quarters, in the course of this long and singular investigation. Every body admits that there never was a case tried, in which the prisoners are more likely to suffer from prejudice. Their traffic was revolting, even when conducted lawfully. When conducted under the suspicion of its being accompanied by theft or murder, it is scarcely possible to get the mind, even of a Jury, subdued to the cool consideration of the legal evidence. In addition to all this, this question has formed the subject of universal conversation; and the whole story, and even the pretended evidence, have been fully discussed in the public prints. The result of this is, that there is probably not one of you, Gentlemen, who came into Court to-day, without a strong impression against the prisoners. You have been so powerfully warned against mistaking this impression for that conviction arising from the evidence, on which alone you ought to decide, that I shall only make one other observation on the subject: It is, that the law supplies you with a clear rule for your guidance, in all such cases. The prosecutor is bound to

prove his case; and if he fails, no matter from what the failure may proceed,—the prisoner is entitled to an acquittal. Nay, more, if there be a doubt,—I mean a rational doubt,—the prisoner is entitled to the benefit even of this.

Can it possibly be said, that there is no rational doubt in this case? So far from it, that I am perfectly satisfied, that if M'Dougal had been under trial for an ordinary murder, of which the public had taken no particular charge, no prosecutor would have seriously asked for a verdict against her upon this proof. But what she is endangered by, is, the cry of the public for a victim. I need scarcely remind you, that this is a cry to which you, who are set apart from the prejudices of the public, and are sworn to look to the legal evidence alone, must be completely deaf. Let the public rage as it pleases. It is the duty, and the glory, of Juries, always to hold the balance the more steadily, the more that the storm of prejudice is up. The time will come when these prejudices will die away. In that hour, you will have to recollect whether you this day yielded to them or not;—a question which you cannot answer to the satisfaction of your own minds, unless you can then recall, or at least are certain that you now feel, legal grounds for convicting this woman, after deducting all the evidence of the Hares, and all your extrajudicial impressions. If you have such evidence,—convict her. If you have not,—your safest course is to find that the libel is not proven.

The Lord Justice-Clerk *charged the Jury.*—His Lordship began his address, by stating, that it afforded him, as well as his brethren on the Bench, the greatest satisfaction, to think, that in a case of so peculiar a nature, and involving, as it did, the life or death of the prisoners, their defence had been conducted by the most eminent counsel at the Bar, and with a zeal and consummate ability which, in all his Lordship's experience, he had never seen surpassed.

His Lordship next expressed himself perfectly confident, that in determining on the evidence laid before them, the Jury would divest their minds of every thing they might have read or heard, having the slightest tendency to excite a prejudice against the prisoners at the Bar. The fate of these persons fell to be determined by the evidence which had been led since the Jury were placed in the box, without regarding, and laying aside altogether, the statements or discussions that might have previously met their eye. The case, too, was to be viewed entirely apart from any of the popular prejudices or notions that were afloat; and the evidence examined and weighed, as scrupulous-

ly and strictly, as if the crime charged were one unattended with the extraordinary circumstances which had excited so intense an interest in all classes of people.

In reference to the evidence adduced, his Lordship characterized it as partly *circumstantial*, and partly *direct*; and observed, that it was upon a careful and deliberate examination of the whole, that the Jury must give their verdict on the guilt or innocence of the pannels. The *circumstantial* evidence adduced of the pannels' guilt, consisted of a long train of facts and circumstances, tending to establish that they were concerned as actors, or art and part, in the murder libelled; while the *direct* evidence, again, consisted entirely of the evidence of Hare and his wife, the associates in the crime. It would, therefore, be proper to look at the case, *first*, in reference to the circumstantial proof adduced; and, *secondly*, as it appears to stand on the evidence of these two persons. It was only upon a fair and impartial consideration, first of each separately, and then of both combined, that a just verdict could be pronounced.

After these preliminary observations, and stating to the Jury, that in regard to the *circumstantial evidence*, it was to be taken as a whole, and not to be broken down or separated into distinct or isolated parts; and after laying it down, that the Jury must, first of all, be satisfied that the woman Docherty, mentioned in the indictment, lost her life by violence, —without evidence of which, there was no case before them,— the Lord Justice-Clerk entered into a careful and minute examination of the whole proof, so far as it consisted of the circumstantial evidence adduced; and commenting, as he went along, on the various facts established, as they appeared to bear on the *corpus delicti*, the guilt of the prisoners, or the arguments urged in explanation of their conduct by their counsel on their behalf. His Lordship then stated, that it was the province of the Jury to draw their own conclusion from the evidence which he had thus brought under their view. *

His Lordship next proceeded to notice the account of the matter under investigation, as given by the pannels in their declarations before the Sheriff; dissenting from the views thrown out by the counsel for the prisoners on this subject, and giving it as his opinion, that the admissions recorded in

* We are obliged to content ourselves with the above general statement of the Lord Justice-Clerk's speech *on this part of the case*, as, without quoting nearly the whole evidence led, and already given in the previous part of this trial, we should do injustice to his Lordship's observations; nor would their bearing be properly understood.

these declarations must, as far as they went, be held as important ingredients in the proof. He observed, that the weight due to the declarations of Burke, could not be weakened by the fact, that *five* different declarations had been taken from him;—as the *two* that had been read, of the 3d and 10th of November, related solely to the alleged murder of the woman *Docherty*, and had no connection with any other charge. Before being asked a single question, both prisoners would be told by the Sheriff, that they were charged with the crime now under investigation, and were not bound to answer any questions that might be put to them on the subject. It was certified in the usual manner, and must be held proved, that the declarations of the prisoners were emitted freely and voluntarily, and that they were in their sound mind and sober senses at the time. Such declarations, it was, and had long been firmly established in the law of Scotland, were legitimate evidence. The Jury were, therefore, not only warranted, but bound to take them into view, as an important and unexceptionable part of the case. His Lordship then proceeded to comment on the various, improbable, and contradictory statements given by the prisoners in their declarations, and particularly in those of Burke; the account given by them of their proceedings, appearing to his Lordship as utterly incredible, and beyond all human belief; while the statements themselves were established by witnesses, against whose testimony no objection had been attempted, to be absolutely false, in every particular of importance.

His Lordship then proceeded to the consideration of the *direct* evidence of the case, as brought out in the testimony of Hare and his wife; and addressed the Jury, in substance, as follows:—'The remarks of the prisoners' counsel, on this part of the case, render it necessary for me shortly to explain to you the law with regard to the admissibility of *socii* in guilt, and the position in which persons in that predicament stand, in relation to their credibility. As to the admissibility of such persons, it must be perfectly obvious, that, were their evidence to be entirely rejected, the purposes of justice would often be completely defeated in occult crimes, which are, generally, the most heinous. It is true, that the persons in question have admitted a concern in the perpetration of the crime charged in the indictment; it may be conceded, morally speaking, that they are equally guilty with the prisoners at the Bar, or, if that be possible, even more so. Still it is entirely out of the question, to go into the idea maintained for the prisoners, that they are, on that account, to be con-

'sidered as *inadmissible* or incompetent witnesses. If this objection was good, it would be a compendious way of getting rid of the evidence of every *socius criminis* who admits his concern in a crime. In point of form, indeed, this argument cannot be maintained, since the witnesses have been actually received and examined, under an implied reservation, of course, as to their credibility. When it is argued, however, that these persons, by acknowledging themselves to be murderers, and, consequently, the vilest of human beings, are, on this ground alone, totally unworthy of credit, and that their testimony is to be entirely laid aside, however consistent in itself, and how much soever it may be corroborated and confirmed by the evidence of other witnesses, to whom no exception either is or can be taken,—the counsel for the prisoners, it is obvious, are just endeavouring to gain, by indirect means, that which the law denies them directly. The persons whose evidence is in question, though, in the ordinary and popular sense, they may be considered as *de facto* infamous, cannot, on that account, be altogether rejected. There must be a conviction, by a competent legal tribunal, and the verdict of a Jury, before even the worst of mankind can be placed in this predicament. They must be infamous *de jure*, and inadmissible, previous to their appearing in Court, and cannot become so by any examination, or investigation into their private conduct, before you. Most undoubtedly, such persons are not to be received on the same footing as witnesses standing in a different situation; still, however, though their evidence may be liable to the greatest suspicion, and may be subjected to a more severe and strict examination than in the ordinary case, you must hear what they have to say. It has been further argued, that Hare and his wife were placed in the situation of being themselves exposed to be tried for other charges of murder, and, indeed, for the other two charges contained in the present indictment; hence, that they have a clear interest to throw the blame of the actual perpetration of the crime on the prisoners, and represent themselves as comparatively or completely innocent. But here, Gentlemen, I feel it necessary to state it to you, as the decided opinion both of myself and my brethren now present, that whatever may be the case with regard to *other* murders, or other crimes, the witnesses in question are as fully protected by the law, in relation to all those contained in the present indictment,—that is to say, against either trial or punishment for them,—as if they had been entirely free from any concern in their perpetration. These persons were

'called on to give evidence on the whole of the charges con-
'tained in the indictment. Eventually, and at a subsequent
'diet, they *may* still be examined in relation to the other two;
'and, therefore, so far as the plea of interest is rested on the
'alleged danger to which they are exposed, it is entirely
'and thoroughly without foundation. The public faith has
'been pledged to these persons, wicked and criminal as they
'may be, and certainly are; and it must, at all hazards, be
'kept sacred. As to their *credibility*, however, that, as I have
'already stated, is a totally different matter. If their evidence
'be inconsistent, and at variance with itself, contradicted by
'other, and entirely unexceptionable, testimony, or standing
'alone, and unsupported by collateral corroborating circum-
'stances,—it is for you to judge of all this, and give such
'weight to the story told by them, as, under the whole cir-
'cumstances, appears to be rational and just. In estimating
'the degree of credibility due to persons of this description,
'you will keep in remembrance the manner in which they gave
'their evidence, and their whole demeanour and behaviour,
'while under examination. You will attend, likewise, in par-
'ticular, to the story told by these two persons, and observe
'whether they differ from, or contradict each other, with regard
'to circumstances of importance, which they had the same
'or equal opportunities of observing. I do not see, however,
'that any other or different rules can, or ought to be applied,
'in comparing the evidence of the two witnesses in question,
'than is done in the ordinary case. I need scarcely observe,
'that slight variations or discrepancies in the account given,
'even of ordinary occurrences, afford no proof that the main
'circumstances are not true. No two individuals, however dis-
'interested and impartial, will give precisely the same ac-
'count of such occurrences. The difference, perhaps imper-
'ceptible, in the opportunities for accurate observation, ac-
'cidental absence of mind, inattention at the moment, or want
'of recollection afterwards, are quite sufficient to account for
'this, without supposing any wilful departure from the truth.
'Indeed, you must be quite aware, that if a false account of a
'transaction is intended to be given, there will be little dif-
'ficulty in concerting a story that will be perfectly consistent
'on the face of it, and in which there will be no discrepancy
'whatever. Slight differences, therefore, in unimportant par-
'ticulars, are a proof rather of the absence of previous con-
'cert or collusion, than otherwise. And if this be true with
'regard to ordinary occurrences, much more must it hold in
'regard to those agitating and horrid circumstances which

'have been the subject of our investigation at this time.'—After some other general remarks, his Lordship proceeded to the consideration of the testimony of the two witnesses, a part of which he read to the jury, commenting on its import, and the effect due to it; *first*, in reference to the story told by the witnesses themselves, and *afterwards* to the facts established by the other and unexceptionable witnesses that had been examined; and in the course of his observations, he stated, that there was some difficulty in reconciling the account of the actual perpetration of this murder, as given by these witnesses, to that detailed by Alston, as to what he heard passing in Burke's house,—though it would be for the Jury to consider, whether allowance should not be made for the state in which Mrs Hare and M'Dougal were, when in the passage. In concluding his charge on this part of the case, his Lordship remarked that if the woman Docherty had, according to the prisoner's account of the matter, died a natural death, or lost her life by accident, it surpassed all human belief that the two witnesses in question should not only attempt to swear away the life of the prisoners; but voluntarily, and without any adequate or conceivable cause, lay upon themselves a load of guilt, by admitting their participation in the crime charged, which they must bear during the whole course of their future lives. The weight due to the testimony of these associates, however, lay entirely with the Jury, who, no doubt, would decide on a just view of all the circumstances as brought out in the evidence adduced.

'Before finally leaving this painful case, I must,' said his Lordship, 'address to you a few words, with regard to the 'situation in which the prisoner, M'Dougal, stands. It is 'not in evidence that she took any part in the *actual* perpe-'tration of the crime; but the question remains, and if answer-'ed in the affirmative, will be equally fatal to her as if she 'had done so,—namely, whether she was an accessory, and 'therefore, to be held in law, as art and part guilty along 'with the other prisoner. Accession to a crime may take 'place before the fact, as well as at the moment the crime is 'committing. It may likewise be *inferred*, from the conduct 'of the party after the fact. And if you are to believe the evi-'dence which you have heard, I am much afraid there are but 'too strong grounds for concluding that the female panel at 'the bar has been guilty of accession to the crime under inves-'tigation, whether you consider her conduct before or after the 'fact, or while it was perpetrating. It is impossible to conceive 'for one moment, that under all the circumstances of the

'case, the pannel, M'Dougal, could be ignorant of the purpose 'for which this wretched woman, Docherty, was brought to 'the house. The state in which Burke and she appear to 'have lived,—their brutal and dissipated habits,—make it im-'possible to believe that either of them kept this woman in 'their house, from the humane or charitable motives which 'they professed to feel, and affected to shew towards that 'unfortunate creature. On one occasion, it would appear 'indeed, from the evidence of Gray's wife, that M'Dougal ac-'tually opposed the woman's proposal of going out of the 'house. The manner, too, in which she communicated the 'fact to Mrs Hare, of this poor woman being in their clutches, 'viz. that they had got a *shot* in the house, shews distinctly 'her complete knowledge of what was in view, and impli-'cates her morally, as well as legally, in the guilt that after-'wards ensued. Again, as to her accession during the per-'petration of the crime, this much appears, according to the 'evidence of Hare and his wife, that both M'Dougal and Mrs 'Hare were in the room, at least, (whether on the bed, as 'Hare states, or standing between the bed and the door, as 'his wife swears, seems immaterial), when Burke placed 'himself on the body of the woman; and that upon hearing 'the first 'screech' of the woman, they both *flew*, as Mrs Hare 'expresses it, to the passage, where they remained till the door 'was opened. By this time, the crime had been accomplished, 'and the body thrust below the bed. These two women return 'to the room, but ask no questions, although they must have 'missed the old woman, whom indeed they had seen a few mi-'nutes before. Their flying into the passage, and remaining 'there, can in no respect be considered as substantially different 'from actual presence; or rather perhaps it ought to be viewed 'as making more strongly against this prisoner. In this way, 'at least, she must have been completely at liberty to call for 'assistance, and prevent the final perpetration of the crime; 'while it takes away the possibility of pretending, as might 'have been done, if she had remained in the room, that she 'was compelled to witness the deed, and dared not take measures 'to prevent it; as it is sworn that she and Mrs Hare had pre-'viously interfered to prevent Burke and Hare from fighting. 'Then, as to her subsequent conduct, in relation to the crime, 'it is equally, and if possible, still more unequivocally esta-'blished, because it does not depend on the evidence of Hare 'and his wife alone. I need not detail all the circumstances 'here referred to; but you will not fail to recollect, among 'others, her share in the concealment of the dead body;—the

'part she took in its transportation and sale, by accompanying the other prisoner and Hare to Surgeon Square and Newington;—the falsehoods she uttered in endeavouring to account for the disappearance of Docherty;—her attempt to bribe to silence the wife of Gray, by an offer of money, and the prospect of putting her husband in the way, if they would be quiet, of his being worth £10 a-week through the prisoners' means.

'You have heard certain legal authorities appealed to by the prisoners' counsel; but I confess, these appear to me to be in no respect applicable to the circumstances of the prisoner, M'Dougal's, case. With regard, in particular, to the case of Taylor and Smith, which has been chiefly relied on, it may be proper to read the distinct account of it, given by Mr Burnett in his work, (*p.* 270). After observing that it was a case of *nicety*, the circumstances are thus stated:—"A girl of the name of *Kelly*, with whom Smith had been "connected, having met him one evening, put into his hands a "child, (of which he was probably the father), then between "two or three months old. *Smith* carried away the child, "and laid it down in a garden, having previously used such "violence against it, as he thought had deprived it of life. "After this, he calls on the other prisoner *Taylor*, a young "man of about seventeen years of age, an apprentice to a "surgeon; informs him of having got a child, (whether he "added *dead* or *alive*, did not appear), and that he would "give him the body for dissection. There was no proof of "any previous concert between them in this business. *Taylor* "made no objection to the proposal, and accompanied *Smith* to "the place where the child had been left, in order to receive "the body. On coming to the place, the child, to the surprise, as it appeared, of *both*, was heard to cry; on which, "according to the account given by *Smith* in his declaration, "having asked *Taylor* the best way of destroying it, he, in "consequence of his directions, deprived it of life, by squeezing its throat, and holding its head under water; while, according to the account given by *Taylor*, *Smith* of himself, "and without any directions from him, killed the child. So "it was, however, the child was killed, *in the presence of Taylor*, who, it appeared, made no objections, or took any means "to prevent it, by giving the alarm, or otherwise; on the "contrary, he immediately after carried away the body to his "master, the surgeon's house. On informing his master how "he came by it, he refused to have any thing to do with the "body, or to allow it to remain in his house; on which *Taylor*

"carried it away, and concealed it in a cellar possessed by "*Smith's* brother. The body was not found till about two "weeks thereafter; while, in the meantime, *Smith* absconded.

"Both were afterwards brought to trial as *guilty actors, or* "*art and part in the murder*. The libel having of course been "found relevant, the proof, so far as applied to *Taylor*, amount-"ed *to his being present at the murder, using no means to pre-*"*vent it*, and afterwards *being found in possession of the body*; "for, as to *Smith's* account of his having directed him how to "kill the child, that could be no evidence against *Taylor*.

"The Counsel for the Crown maintained, that the circum-"stances above mentioned were sufficient to infer *art* and *part* "in the murder.—"Here (it was argued), is a murder com-"mitted; the dead body is found in the possession of the pri-"soner *Taylor*. This throws the *onus* upon him of proving "how he came by it." His account is,—"I came to the "place, saw the child murdered, gave no alarm; did not even "disapprove of it; and afterwards carried away the dead body "for the purpose of dissection. Do not these circumstances "amount to a full and complete *accession* to the murder?" "It was, on the other hand maintained, that as the proof a-"gainst Taylor amounted only to *mere presence* at the time, "without any advice, aid, or assistance in the act; without "any previous concert with the murderer, or even knowledge "that such a thing was intended by him; on the contrary, as "he, (Taylor,) *came there*, conceiving the child to be dead, and "with a view merely to carry away the body for the purpose "of dissection, his *accidental and unexpected presence* at the "murder, ought not, in these circumstances, to infer *art and* "*part* in the deed; while his having the body afterwards in "his possession, and concealing the murder, were neither cir-"cumstances, *per se*, nor, when coupled with the *presence*, "that could in this case infer *art and part*.

"The Court seemed to be of opinion, that in the general case, "*presence* at a murder, joined to *after concealment*, and being *in* "*possession of the dead body*, were circumstances sufficient to "infer *art and part*; but it was left to the Jury to consider, "whether the *mere presence* here, at the murder of a *child*, an "act so *instantaneous* in its nature, as to leave little time to "the bystander, either for reflection, or the giving an alarm, "while no previous concert or knowledge of the deed was "proved, or even alleged, and the possession of the body after-"wards being by *a surgeon's apprentice*, who might innocently "be brought into that situation, ought, in such a case, to infer

"*art and part.* The Jury convicted *Smith*, but acquitted "*Taylor*."

'As to this case, I shall content myself with stating, that 'while I concur in the law, as laid down by the Court, I 'must presume to dissent from the verdict of the Jury. 'But, at any rate, it is obvious, that this case of Tay-'lor, is a totally different one from the present. According to Mr Burnett's statement, the proof, so far 'as applicable to Taylor, amounted to his being present 'at the murder,—using no means to prevent it,—and afterwards being found in possession of the body. There neither, 'however, was, nor could be, in that case, any previous assistance or co-operation in relation to the deed; it is certain 'Taylor had no previous knowledge of any intention on the 'part of Smith to commit the murder; and even that person 'appears to have believed that it had been already accomplished. It is impossible, therefore, to hold the two cases as 'analagous; and if you believe the evidence laid before you, 'of the prisoner's whole conduct, you must, in my opinion, hold her to be guilty, art and part, along with Burke. 'In determining this question, you will not fail to keep in 'view the statements made in the declarations of this prisoner. 'She there not only denies that she knew of any dead body 'being in the house, but positively declares that she did not 'see the woman Docherty at all, after two o'clock on the 'Friday; and, in particular, she did not see her in the house 'on the Friday night,—that is, on the night of the murder. 'In short, her case is totally different from that of Taylor.'

His Lordship concluded his charge to the Jury, with observing, that he now left the case in their hands, satisfied they would return such a verdict as justice required. If they had doubts,—reasonable and rational doubts on the subject of the prisoners' guilt, or either of them,—they were bound to give them the benefit of these doubts, without allowing their own minds to be influenced or carried away by any prejudices or popular clamour that might exist against the pannels. On the other hand, if the Jury were, in their consciences, satisfied of the guilt of the prisoners, they must return a verdict accordingly.

The Jury retired at half-past eight o'clock in the morning, and, after an absence of about fifty minutes, returned the following Verdict, *viva voce*, by their chancellor, JOHN M'FIE, Esq.—

'The Jury find the Pannel. William Burke, GUILTY of the *third* '*charge in the Indictment;* and find the Indictment NOT PROVEN 'against the Pannel, Helen M'Dougal.'

LORD JUSTICE-CLERK.—*Gentlemen of the Jury*,—While I return you the thanks of the Court for the unwearied pains and attention you have bestowed on this case, it must be satisfactory for you to know, that it is the opinion of the Court, that your verdict appears to be perfectly well founded. Entertaining, as you did, doubts of the guilt of the female prisoner, you gave her the benefit of those doubts.

LORD ADVOCATE.—*My Lord Justice-Clerk*,—I beg leave to move your Lordship for the judgment of the Court.

LORD JUSTICE-CLERK.—*My Lord Meadowbank*,—It is your Lordship's duty now to propose the sentence to follow upon this verdict.

LORD MEADOWBANK.—*My Lord Justice-Clerk*,—After a trial of an unprecedented nature,—of nearly unexampled duration, having been protracted in length to almost twenty-four hours,—and during the whole of which time the minds of your Lordships have been kept upon the utmost stretch of exertion, it would be unpardonable for me, in discharging the painful duty that has devolved upon me, to think of resuming, at length, the appalling circumstances which, during the course of the proceedings, have been laid in evidence before the Court and the public.

At the same time, however, it is impossible for me, in discharging this part of our duty, not to advert, in a single sentence, to that most extraordinary,—that most sanguinary and atrocious system, which your Lordships feel has been developed and established, beyond all question, by the clearest evidence that has ever been divulged in a Court of Justice.

My Lords, I am confident, that although speaking in the presence of your Lordships, so much better instructed than myself, and so able to correct me were I in error, there is no chance of my being contradicted, when I say, that in the history of this country,—nay, in the whole history of civilized society,—there never has been exhibited such a system of barbarous and savage iniquity, or any thing at all corresponding in atrocity, to what this trial has brought to light.

Individual murders have been committed,—crimes of all descriptions have been perpetrated, more arising from the spirit of revenge, or the lure of plunder, or the other vindictive and sordid passions to which human nature is exposed; but that there should, at this time of day,—in this country, (which we had all of us hoped was in some measure free from the reproach of most of the more odious and more heinous species

of crimes,) have been found to be regularly organized and established a system of cold and premeditated murder, such as we have now heard of, was, I am sure, beyond the imaginations of your Lordships to have conceived. Had one individual been found so utterly divested of all human feeling, as to have been guilty of the offences here brought to light, your Lordships might well have been amazed and horrified. But it is almost beyond conception, to imagine that there should have existed, in this great and populous city, not one individual only, but apparently a number of individuals, both male and female, leagued and combined together, for the purpose of sacrificing their unoffending fellow citizens, for the sordid purpose of selling their bodies, after they had been murdered, for a price, is inexpressibly horrible; and, to one, feeling for the character of his country, in the last degree, humiliating. It would be in vain that I should search for words to express the ideas which the general announcement of such a system of horrible atrocity, must necessarily create.

But, my Lords, this is not a case for dealing in general reflections. When we look at its other and more distinguishing features, it would have required, upon my own part at least, a very strong stretch of the imagination, to have believed that it could possibly have been found to exist among the most abandoned of the human race, had it not been exhibited before us, in a chain of evidence, so absolutely incontrovertible, as to have carried conviction to every one who heard it.

The prisoner at the Bar, my Lords, it has been proved, in the course of some apparently usual daily avocations, left his house early in the morning, on the day stated in this indictment. In a shop into which he went, it happened that he met with the poor and unprotected stranger, whose untimely fate has been the subject of this trial, with whom, it is quite clear, from all that we have heard, that he never was before acquainted. But his sanguinary trade was ever uppermost in his mind, and he did not let the opportunity of seizing upon a victim, escape him; and the manner in which he brought her within his toils, is no less extraordinary than appalling. Having induced her to inform him of her name, —and finding she came from Ireland, his native country,— he immediately pretended to lay claim to her as one of his kindred, and exhibited a sympathy with the unfortunate situation in which at the time she seemed to be placed. He then entices her to his own house, and by the appearance of kindness, and by friendly offices, he contrives to acquire her confidence and affections, to an extent that would, in so short a time, almost seem unaccountable. But, from the evidence of

the woman Connoway, it is proved he was, in this respect, so successful, that the unfortunate old victim of his cold and deliberate, and murderous designs, had been prevailed upon, unhesitatingly, to look up to him for support and protection. To that woman she declared, only a few minutes before her life was finally extinguished by the hands of the wretched man at the Bar,—that by her he had dealt kindly, and that to him she looked up for safety and protection. So strongly had this feeling impressed itself upon her mind, that she informed Connoway that she would not enter his house without him; and accordingly, when she saw him pass the door, she followed him into the house of slaughter, from which she was never to return.

Then observe, my Lords, what takes place.

A struggle takes place betwixt the pannel and Hare, that most extraordinary being who was produced at your Lordships' bar as an associate in this crime, or rather system of crimes; but I should rather say a *pretended* struggle takes place betwixt them,—for your Lordships will recollect, that in the course of it, the woman was thrown down by Hare, and that the moment she was upon the ground, that struggle instantly ceased. Hare placed himself at the foot of the bed, and the prisoner instantaneouly, and with the ferocity of a demon, threw himself upon his unfortunate victim, and by means with which he seems to have been long familiar, extinguished her life in a few minutes.

Your Lordships will, I believe, in vain search through both the real and fabulous histories of crime, for anything at all approaching to this cold, hypocritical, calculating, and bloody murder.

Be assured, however, my Lords, that I do not state this either for exciting prejudices against the individual at the bar, or for harrowing up the feelings with which I trust he is now impressed.

But really, when a system of such a nature is thus developed, and when the actors in this system are thus exhibited, it appears to me that your Lordships are bound, for the sake of public justice, to express the feelings which you entertain of one of the most terrific, and one of the most monstrous delineations of human depravity, that has ever been brought under your consideration. Nor can your Lordships forget the glowing observations which were made from the Bar, in one of the addresses on behalf of the prisoners, upon the causes which it was said have, in some measure, led to the establishment of this atrocious system. These alone, in my humble opinion, seem to require that your Lordships should state

roundly, that with such matters, and with matters of science, we, sitting in this place, and deciding on such questions as that before us, have nothing to do. It is our duty to administer the law as handed down to us by our ancestors, and enacted by the legislature. But God forbid that it should ever be conceived, that the claims of speculation, or the claims of science, or the claims of philosophy, should ever give countenance to such awful atrocities as the present, or should lead your Lordships, or the people of this country, to contemplate such crimes with apathy or indifference.

With respect to the case before us, your Lordships are aware, that the only sentence which we can pronounce, is the sentence of death. The highest law has said,—'Thou shalt 'not kill,—thou shalt do no murder;' and in like manner, the law of Scotland has declared, That the man guilty of deliberate and premeditated murder, shall suffer death. The conscience of the prisoner must have told him, when he perpetrated this foul and deliberate murder, and alike violating the law of God, and the law of man, he thereby forfeited his life to the laws of his country. Now that detection has followed, therefore, the result cannot be by him unexpected; and I have therefore only farther to suggest to your Lordship, that the prisoner be detained in the tolbooth of Edinburgh, till the 28th day of January next, when he shall suffer death on a gibbet by the hands of the common executioner, and his body thereafter be given for dissection.

Lord Mackenzie.—*My Lord Justice-Clerk*,—I have nothing to say further, than that I concur in thinking, that the punishment proposed to the Court by his Lordship, is the only punishment that can be pronounced.

Lord Justice-Clerk.—*William Burke*, You now stand convicted, by the verdict of a most respectable Jury of your country, of the atrocious murder charged against you in this indictment, upon evidence which carried conviction to the mind of every man that heard it, in establishing your guilt of that offence. I agree so completely with my brother on my right hand, who has so fully and eloquently described the nature of your offence, that I will not occupy the time of the Court in commenting on it, farther than by saying, that one of a blacker description,—more atrocious in point of cool-blooded deliberation, and systematic arrangement, and where the motives were so comparatively base,—never was exhibited in the annals of this, or of any other Court of Justice. I have no intention, Sir, to detain this audience, by repeating what has

been so well expressed by my brother. My duty is of a different nature; for if ever it was clear, beyond all possibility of a doubt, that the sentence of a Criminal Court will be carried into execution, in any case, your's is that one,—and you may rest assured, that you have now no other duty to perform on earth, but to prepare, in the most suitable manner, for appearing before the Throne of Almighty God, to answer for this crime, and for every other that you have been guilty of during your life. The necessity of repressing offences of this most extraordinary and alarming description, precludes the possibility of your entertaining the slightest hope that there will be any alteration upon your sentence. In regard to your case, the only doubt that has come across my mind, is, whether, in order to mark the sense that the Court entertains of your offence, and which the violated laws of the country entertain respecting it, your body should not be exhibited in chains, in order to deter others from the like crimes in time coming. But, taking into consideration that the public eye would be offended with so dismal an exhibition, I am disposed to agree that your sentence shall be put in execution in the usual way, but accompanied with the statutory attendant of the punishment of the crime of murder, viz.—that your body should be publicly dissected and anatomized. And I trust, that if it is ever customary to preserve skeletons, your's will be preserved, in order that posterity may keep in remembrance your atrocious crimes. I would entreat you to betake yourself immediately to a thorough repentance, and to humble yourself in the sight of Almighty God.—Call instantly to your aid the ministers of religion, of whatever persuasion you are,—avail yourself, from this hour forward, of their instructions; so that you may be brought, in a suitable manner, urgently to implore pardon from an offended God. I need not allude to any other case than what has occupied our attention these many hours; you are conscious in your own mind, whether the other charges that were exhibited against you yesterday morning, were such as might be established against you or not;—I refer to them, merely for the purpose of again recommending that you may devote the few days that you are on earth, to imploring forgiveness from Almighty God.

SENTENCE.

The Lord Justice Clerk, and Lords Commissioners of Justiciary, in respect of the verdict before recorded, decern and adjudge the said William Burke, pannel, to be carried from the bar, back to the tolbooth of Edinburgh, therein to be detained, and to be fed upon bread and water only, in terms of an act of parliament passed

in the twenty-fifth year of the reign of his Majesty King George the Second, entitled "An act for preventing the horrid crime of murder," until Wednesday the 28th day of January next to come, and upon that day to be taken forth of the said tolbooth to the common place of execution, in the Lawnmarket of Edinburgh, and then and there, between the hours of eight and ten o'clock before noon, of the said day, to be hanged by the neck, by the hands of the common executioner, upon a gibbet, until he be dead, and his body thereafter to be delivered to Dr. Alexander Monro, Professor of Anatomy in the University of Edinburgh, to be by him publicly dissected and anatomized, in terms of the said act; and ordain all his moveable goods and gear to be escheat and inbrought to his Majesty's use, which is pronounced for doom. And may Almighty God have mercy on your soul.

Lord Justice-Clerk.—*Helen M'Dougal*, The jury have found the libel against you *not proven;*—they have not pronounced you *not guilty* of the crime of murder charged against you in this indictment. You know whether you have been in the commission of this atrocious crime. I leave it to your own conscience to draw the proper conclusion. I hope and trust that you will betake yourself to a new line of life, diametrically opposite from that which you have led for a number of years.

The following interlocutor was then pronounced:—

"The Lords assoilzie the pannel Helen M'Dougal, *simpliciter*, and dismiss her from the bar."

FINIS.

RHYMES

ON

READING

THE TRIAL OF

WILLIAM BURKE AND HELEN M'DOUGAL

FOR MURDER,

24th December 1828.

AN EXPOSTULATION.

" THOU CAN'ST NOT SAY I *DID* IT!!!"

AH!——can'st thou, with cold indifference, see
The hand of execration point to thee?
Can'st thou, unmov'd, hear a whole nation's cry,
To cleanse thyself from the polluted sty
Of Burke, and Hare, and all that fiendish crew,
Who, for mere gain, their fellow-mortals slew,
And sold to thee, as thou hast not denied,
Such bodies as by students were descried
Ne'er to have been interred, nay, bore, some say,
Strong marks of life, by violence reft away?
And thou didst not attempt the truth to find,
Though oft it must have flash'd across thy mind;
But, with a reckless careleeness, receiv'd
Whate'er was brought, * and any lie believ'd,

* *Vide* the evidence produced on the trial of Burke, &c. It has been told as a fact, that this gang carried off to ——— one of their slaughtered victims in such a dreadful hurry, that the body actually *groaned* in the box on the porter's back. No doubt, the half-strangled being would be dead enough after a night in the ——— cellar.

Told by that gang, whose very forms do show
They would not tell thee aught thou did'st not know,
Or should'st have known, if true thy Science says,
That marks of death by *Murder* any ways
May well be seen, when the dissecting knife
Opes all the sure and secret seats of life. †
Art thou a Scotsman ——— ? then haste to prove
That patriot feelings can thy bosom move;
Haste to wipe out the stain thy country shares,
While such a stigma fair Edina bears.
Art thou a son of Science? quickly, then,
Show she does not make brutes of *lect'ring* men.
Art thou a Father? then thy child may plead,
To cleanse thyself from this unholy deed.
Art thou a husband? ask thine honest wife,
If 'twere not better to descend in life,
Than traffic with the basest, vilest band,
And thus for ——— soon's the deed is plann'd;
A ready market keep—and hide away
An *old tea-box*, that's all which you can say.
Art thou a Christian? think'st thou this avails
With Him on high, who, with unerring scales,
Weighs all the thoughts, and words, and deeds of men,
And searches through, ev'n the soul's inmost *ken?*
If this dread argument will not prevail,
Nought can thy cold obdurate heart assail.

Yes, time mispent, and surely worse than vain,
'Tis to attempt to rouse, by my poor strain,
The proud rich man, hedg'd round by many a friend
Whose voice th' applause of hundred youths attend.
If his own conscience will not wake and cry,
Assert thine innocence, REPLY, REPLY,
To all the accusations lately rais'd
'Gainst thy fair fame, till ev'n —— has gaz'd,
And gaz'd in vain to see thee —— come forth,
Arm'd with thy——thy——and thy——
* * * * *Cetera desunt.*

† The ——— is understood to be profoundly skilled in Anatomy; consequently, it is one of the bitterest satires which can be uttered against the utility of that Science, to say that he was *ignorant* that the bodies supplied by Burke and his gang had come to their death by violence.

THE LAMENT.

"Whoso sheddeth man's blood, by man shall his blood be shed."—*Genesis*, ix. 6.

"Bloody and deceitful men shall not live out half their days."—*Psalm* lv. 23.

"Depart from me therefore, ye bloody men."—*ib.* cxxxix. 19.

"Now thou son of man, wilt thou judge, wilt thou judge the bloody city?"—*Ezekiel*, xxii. 2.

"The voice of thy brother's blood crieth unto me from the ground."—*Genesis*, iv. 10.

O woe for bonny Scotland,
  For murder is abroad,
And we must flee for refuge,
  To an avenging God.
For we have seen that Law alone,
  Can do us little *gude*,
As it has let three demons loose.
  To work *mair* deeds of *blude*.

Ye bloody fiends, ye hellish fiends,
  Dare ye here yet be seen,
With the mark of blood upon your brows,
  And murder in your *een!*
O woe for my *ain* Scotland,
  For thou art now the land,
Chosen for such deeds of darkness,
  As man before ne'er plann'd.*

* The case quoted by Glossin, in Guy Mannering, Vol. iii., and which has been going the round of the Newspapers, *atrocious as it was*, cannot be taken as a parallel to Burke and Hare's *infernal* system.

Alas for Mary Paterson,
  Cut off in her young days,
Wi' a' her sins upon her,
  And in her wicked ways;
While steep'd in drunk stupidity,
  And overcome by sleep,
On his devoted victim
  Burke took the dreadful leap.

And alas for the old woman,
  Entic'd to revelry,
Under the mask of country kindness,
  By a Judas for his fee;
That he might sell her body,
  When he had done the deed,
And with the price of human blood,
  His *loathsome* carcass feed.

O'hon for poor *Daft* Jamie,
  Whom we shall miss away,
In his own happy *idiocy*,
  Sae gude-natur'd and gay!
O! who shall cheer the mother
  For the want of her poor boy,
By's simpleness the more endear'd
  To her—her only joy.

But our all-gracious Maker
  Will surely soon look down,
On this detested murder
  With his all-powerful frown!

* * * *
* *

In search of his dear mother,
  Burke found him wand'ring then,
And for to see his parent,
  Was lur'd to Hare's dread den;
Where he was ply'd with liquor,
  (And all by coaxings prest),
Till he was quite o'erpow'red,
  And laid him down to rest.

The two fell fiends they watch'd then,
  Until he soundly slept,
Then Hare upon his destin'd prey
  With murderous purpose crept.

And having fastened on him,
  Hare strove his life to take;
Which recall'd his long lost reason,
  And did his senses wake.

He shook the butcher from him;
  And seeing no help there,
He fought with all the frenzy
  Of madness and despair.
His cowardly assassin,
  Did crouch beneath his blows,
And called on Burke his comrade
  To give the murderous close.

They two, conjoin'd together,
  Depriv'd him of his life;
But not before he left them
  Marks of the desperate strife.
In his tremendous struggle,
  Though weaken'd much by drink,
He show'd how men do fight for life,
  When on death's dreadful brink.

His body, it is said, (if true,
  Let those who bought beware)
Was sold to an Anatomist;
  And some one did declare,
When it lay on his table
  For the dissecting knife,
That it was poor *daft* Jamie,
  Whom he saw strong in life

But yesterday; and more 'twas strange
  As all knew passing well,
He was a stout and hearty youth,
  The rest I may not tell;
But loudly it's been whisper'd,
  That damning marks of strife
Show'd clear that death by violence
  Had *twin'd* him of his life.

'Tis told, that then the body
  Was laid in spirits strong,
To remove all such suspicions,
  And hide the cruel wrong.

Is so! O righteous Heaven,
  To Thee we look for aid;
Nor will thy kindling anger
  Be longer much delay'd!

Thou art the *poor's* avenger,
  The *idiot's* only guard,
The *childless* mother's helper,
  The good man's high reward.
To Thee then we are looking,
  To appease the cry of blood
Which runs throughout our city,
  Like a portentous flood!

And we do hold thy promise,
  We shall not look in vain;
For whoso sheddeth man's blood,
  He surely shall be slain!

A LETTER

TO THE

EDITOR OF THE CALEDONIAN MERCURY.

EDINBURGH, 15*th January* 1829.

SIR,

I am happy to see that your brother Journalists have spoken in proper terms of the zeal, industry and talent, which your paper has lately displayed; and it must no doubt be a high gratification to you, to see that the country at large feels itself deeply indebted for the unceasing efforts and unwearied spirit of intelligence displayed in its columns, ever since the discovery of Burke and his atrocious associates.

Permit me therefore, Sir, to hope that you will not leave the good work unfinished;—and in the meantime, may I ask you to call forth public gratitude in the shape of a handsome subscription for the benefit of James Gray and his wife. All who have read or may read the trial of Burke and M'Dougal, must see the immense importance of their testimony—in fact, could they have been bribed not to inform about the dead body, * these murderous *fiends*, Burke and Hare, aided and abetted by their *miscreant* female companions, would still have been pursuing their dark deeds of blood.

I know that the Editor of the "Edinburgh Evening Courant," has been written to in behalf of Gray and his wife, (they have a young child, as you are aware), by the Publishers of the authentic edition of Burke's Trial; and although they have had Subscription Books † lying open in their Shops for a week past, and this has been advertised in three of the principal papers, yet, strange to say, (notwithstanding all own the propriety of the measure, and many were eager in their promises before the good work was begun), not even Ten Pounds have been collected.

Gray has got a situation in the Police, and intends, should sufficient funds be raised, to open a small shop for his wife, paying the first year's rent, and the stock necessary to start with, out of the subscription money; surely it is not being too sanguine in trusting this may be done.

Sir, You drubbed Macculloch (the libeller of his country) delightfully; and it is hoped you will keep a good look out, if "The Sun" again shows any more such dirty dark spots as the one you lately held up to merited abhorrence. It is a general remark, that our Scottish papers are sadly

* They did not think that murder had been committed, consequently this shews their *honest feelings* could not be brought to wink even at *theft*.—M'Dougal has had two children by Mrs Gray's father.

† Any respectable Bookseller, &c. wishing to join in this, may have a Subscription Book, on application to any of the publishers.

deficient in public spirit. The Public have had just grounds to hope, that the Mercury, in your hands, would give them at least one free-spoken and independent Journal; I hope, therefore, it is not true, that you are about to retire from the Editorship of it. I am,

SIR,

Your most obedient servant,

CANDIDUS.

LETTER to the JURY that acquitted HELEN M'DOUGAL.

" Judex damnatur cum nocens absolvitur. "

EDINBURGH, 15*th January* 1829.

GENTLEMEN,

I WRITE to you more in sorrow than in anger. I cannot at present address you fully (as I intended) upon the propriety of your verdict, because the *complete* edition of the Trial will not be published till the afternoon of this day; and as it is to that I mean to make references in proof of what I shall assert, consequently another opportunity must be chosen. You will see, from the Preface to the *second* edition of Part First of the Trial, what a most respectable literary Gentleman (who has taken much pains in investigating into this horrid affair) thinks of your Verdict; and I can assure you, all whom I have heard speak (and I have heard *not a few* of all ranks) on the subject, say they cannot understand upon what grounds you found the libel against M'-Dougal *not proven*. I have no doubt you must have had grounds which appeared satisfactory to your consciences, although the Public cannot perceive them; and if you acted conscientiously, no man has any right to find fault. Still the Public has a right to remark upon your verdict; but I am told we should be thankful, as two of you were *even* for acquitting Burke! As it is, it is bad enough; but had Burke likewise escaped, then indeed, to use the emphatic words of the Lord Advocate, " THE SITUATION of the Prosecutor, or rather OF THE COUNTRY, " WOULD HAVE BEEN " MOST DEPLORABLE. "

I am, Gentlemen, your most obedient servant,

CANDIDUS.

PRINTED BY J. HUTCHISON,
EDINBURGH.

Mrs Barr.

As she appeared in the "Witness's Box".

"I've seen such tricks before".

SUPPLEMENT

TO THE TRIAL OF

WILLIAM BURKE & HELEN M'DOUGAL,

CONTAINING

THE WHOLE LEGAL PROCEEDINGS

AGAINST

WILLIAM HARE,

IN ORDER TO BRING HIM TO TRIAL FOR

THE MURDER OF

JAMES WILSON, OR DAFT JAMIE.

WITH

AN APPENDIX

OF

CURIOUS AND INTERESTING INFORMATION,

REGARDING THE LATE

WEST-PORT MURDERS.

ILLUSTRATED BY A LITHOGRAPHIC PRINT OF MRS HARE AND HER CHILD, AS THEY APPEARED IN THE WITNESS BOX.

EDINBURGH:

PRINTED FOR ROBERT BUCHANAN, 26, GEORGE STREET; WILLIAM HUNTER, 23, HANOVER STREET; JOHN STEVENSON, 87, PRINCES' STREET; AND BALDWIN & CRADOCK, PATERNOSTER ROW, LONDON.

MDCCCXXIX.

ADVERTISEMENT.

THE Publishers beg leave to intimate, that the whole of the Opinions delivered by the Judges in this Novel and Important Case, have been carefully revised by their Lordships; and that every effort has been made to render this Supplement,—along with the Trial of Burke and M'Dougal,—a full and Authentic Record of the whole Legal Proceedings instituted relative to the *West-Port Murders.*

EDINBURGH,
20*th February* 1829.

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PRELIMINARY NOTICE.

IMMEDIATELY after giving their evidence on the trial of Burke, WILLIAM HARE and his wife were recommitted to the jail of Edinburgh, under a warrant of the Sheriff; where they were detained, either with the view of eliciting from them farther information relative to the atrocious transactions in which they had been engaged, or in the expectation of discovering some new case against them, upon which they might be brought to trial, without infringing the unqualified assurance of protection and indemnity given them by the Lord Advocate, as an inducement to turn King's evidence, in order to ensure the conviction of Burke. It would appear, that in the latter view, at least, the public prosecutor was unsuccessful; and, accordingly, it was ascertained, on the 19th of January, that the commitment on the part of the Crown would be instantly withdrawn.

In the meantime, the public mind being strongly excited by the horrid disclosures made upon the trial of Burke, the popular indignation, after his conviction, was next directed against his associate, Hare, whose evidence,—given with such levity and *sang froid*,—at once pointed him out as likely to have been the greater villain of the two, and as a monster so conversant with such atrocities, that his conscience, seared by his constant career in crime, felt no compunction for the enormities he had committed, but which, he rather seemed to look upon with callous indifference: Circumstances afterwards transpired, which greatly increased the rancorous feeling against Hare, as they tended to shew that he was not only the principal actor in these bloody and merciless scenes, but was the tutor and instigator of his convicted accomplice.

The public journals kept alive and fostered this natural, and laudable feeling, on the part of the people, and vigorously maintained the necessity of further disclosures; calling

upon the Lord Advocate to redeem the pledge he had given, that he would probe the matter to the bottom: Public vengeance would not be satisfied with the condemnation of Burke alone, and loudly demanded the sacrifice of Hare at the pale of justice: Great clamour was likewise raised, that the public prosecutor was impeding the course of the law, by permitting Hare to escape the punishment his crimes so justly deserved,—on the ground that having turned King's evidence for the trial of Burke, he could not be afterwards prosecuted for any of the other murders charged in his indictment.

There being, therefore, no chance of Hare being brought to trial by the Lord Advocate, and the public being dissatisfied at his thus escaping punishment, subscriptions were raised to enable the relations of James Wilson, better known by the name of *Daft Jamie*, to institute a private criminal prosecution, for the murder of that individual, against Hare, with the concurrence of his Majesty's Advocate. Accordingly, an agent was employed, and eminent counsel retained, to conduct the prosecution. A petition was presented to the Sheriff on the 16th January, by the private prosecutors, charging Hare with the murder of the said James Wilson, upon which he was examined, and thereafter detained a close prisoner in the jail of Edinburgh; and a precognition was immediately instituted.

On the 20th January, Hare (his wife having been liberated on the day previous,) applied to the Sheriff, by a petition, (which will be found embodied in the bill of advocation,) praying, *inter alia*, that his Lordship would recall the said warrant, and ordain him to be set at liberty; and also to interdict the aforesaid precognition from being further proceeded in. This petition was ordered to be served on Mr George Monro, solicitor, as agent for Janet Wilson, the mother of *Daft Jamie*, and parties were appointed to be heard on this application the day following; and all further proceedings were sisted in the meantime. On hearing Mr Jeffrey, as counsel for the private prosecutors, and Mr Duncan M'Neill, on the part of Hare, the Sheriff pronounced the following judgment:—'*Edinburgh*, '*21st January* 1829.—The Sheriff having resumed the consideration of the petition of William Hare, and having heard counsel for William Hare, and the respondents, Janet Wilson, senior and junior; In respect that there is no decision, finding that the right of the private party to prosecute is barred by any guarantee, or promise of indemnity given by the public prosecutor, refuses the desire of the petition; but in respect of the novelty of the case, supersedes farther proceeding in the precognition before the Sheriff, at the instance of the respondents, till Friday next, at seven o'clock,

'in order that William Hare may have an opportunity of applying to the Court of Justiciary.'

(Signed) 'AD. DUFF.'

'*Note.*—The application which has been made to the Lord Provost for liberty to see Burke, by the private prosecutors, is not before us, but remains to be disposed of by the Lord Provost.'

The following BILL of ADVOCATION, SUSPENSION, and LIBERATION, was accordingly presented to the High Court of Justiciary, on behalf of Hare, complaining of the Sheriff's decision.

MY LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, and Lords Commissioners of Justiciary,—Unto your Lordships humbly COMPLAINS and SHEWS your servitor, WILLIAM HARE, present prisoner in the tolbooth of Edinburgh,—That he has to complain to your Lordships of, and bring under your review, certain proceedings *in criminalibus*, adopted against him before the Sheriff of Edinburgh, on the application, and at the instance of two joint private prosecutors, Janet Wilson senior, and Janet Wilson junior, in virtue, and in consequence of which, they are in the course of leading an *ex parte* precognition against him before the Sheriff; and they have obtained from the Sheriff, a warrant, under which the complainer is confined by them a close prisoner, on a charge of murder, which they have made against him: And a petition presented by him for recall of the said warrant, and for liberation, and for stopping the said precognition, has been refused by the Sheriff; MOST WRONGOUSLY AND UNJUSTLY, as will appear to your Lordships, from a statement of the facts. The material facts are set forth in the said petition presented by the complainer to the Sheriff, which was of the following tenor:—'That, of this date, (10th November 1828), the petitioner was apprehended on a warrant of your Lordship's substitute, granted on the application of the Procurator-fiscal of the county, and was committed to the jail of Edinburgh, a prisoner, on a charge of murder: That the petitioner was examined before the Sheriff-substitute of the county, in relation to various acts of murder alleged, or suspected to have been committed by William Burke, then in custody, and other persons: That in the course of these examinations, the petitioner was assured by the public prosecutor, that if he made a full disclosure of all he knew relative to the several alleged mur-

'ders, which formed the subject of inquiry, no criminal pro-
'ceedings would be instituted against the petitioner himself,
'in relation thereto, whatever might be the circumstances of
'suspicion, or apparent participation or guiltiness appearing
'against him: That the petitioner was examined as a wit-
'ness, and without the caution and warning which it is
'the duty of the Judge-examinator to give to a party ac-
'cused, every time he is brought up for examination, and
'the petitioner made a full and true disclosure of all he
'knew, and gave every information he possessed, in relation to
'all the alleged murders, as to which he was examined; and
'this he did under the assurance of personal and individual
'protection above-mentioned: That one of the alleged mur-
'ders, as to which the petitioner was so examined, was that
'of a person described as James Wilson, commonly known by
'the name of *Daft Jamie;* and in relation to that murder, as
'well as in relation to all the others, the petitioner made a
'full and true statement, and gave every information he pos-
'sessed, whether relative to the alleged act of murder itself, or
'the means of obtaining or tracing any circumstances of evi-
'dence in relation thereto. And all this he did, relying on
'personal and individual safety, above-mentioned, and the
'compact and transaction thence arising, that in consequence
'of the statement and information thus elicited from, and pro-
'cured through, the petitioner, the said William Burke was
'indicted to stand trial before the High Court of Justiciary, in
'the month of December last, on a libel, setting forth three
'charges of murder, as to all of which the petitioner had been
'precognosced, as aforesaid: That one of these three charges
'was the foresaid alleged murder of James Wilson, *alias Daft*
'*Jamie*: That in the list of witnesses annexed to the said li-
'bel, the petitioner was included for the prosecutor, and he
'was cited to attend as a witness for the prosecution, in
'relation to all the charges therein contained. The libel
'was found relevant to infer the pains of law; and the public
'prosecutor having proceeded to lead evidence against William
'Burke and another prisoner, as to one of the charges, (being
'the murder of Mary Docherty), the petitioner was called,
'sworn, and examined as a witness for the prosecution. On
'that occasion, the petitioner stated many things in evidence,
'which he would not have stated, and could not have been re-
'quested to state, but for the perfect assurance of personal se-
'curity given him by the public prosecutor, not only as to the
'murder of Mary Docherty, but likewise from any prosecu-
'tion as to other murders charged in that indictment, and
'which was laid down and confirmed from the Bench at the
'said trial. It was then stated from the Chair of the Court,

'as the decided opinion of the whole Bench present, that the 'petitioner was fully protected by law against either trial or 'punishment for any of the charges contained in that indict-'ment: That the public prosecutor, having obtained a capital 'conviction and sentence against William Burke, on the last 'charge on which evidence was led, has not thought it proper 'to proceed with any of the other charges, and probably never 'will: That notwithstanding the compact with the public 'prosecutor, under which the petitioner was induced to make 'disclosures of great importance to the public interest, and to 'the administration of justice, but which were calculated to in-'volve himself in circumstances of suspicion and hazard, 'in which he could not otherwise have been involved; and 'notwithstanding the assurance of personal safety held out to 'the petitioner from the Bench, criminal proceedings have, 'within these few days, been instituted against the petitioner, 'at the instance of Janet Wilson, alleged sister, and Janet 'Wilson, alleged mother of the said James Wilson, alias *Daft 'Jamie*; but who, the petitioner is informed, and has reason to 'believe, do not truly possess these characters, and have pro-'duced no evidence thereof. And he has been examined be-'fore the Sheriff-substitute, as a party accused of that offence, 'and is now a *close prisoner* in the jail of Edinburgh, commit-'ted for further examination as to that charge of murder: 'That under the circumstances above detailed, the petitioner 'is advised, that the proceedings thus instituted against him 'are incompetent, irregular, oppressive, and illegal, and that 'the warrant on which he is committed, at the instance of 'the said Janets Wilson, is illegal, and that he is entitled to 'immediate liberation: That the petitioner has been in-'formed, that the said Janet Wilson, alleged mother, 'and Janet Wilson, alleged sister, have applied for, and 'obtained the authority of your Lordship to lead a pre-'cognition, and examine witnesses, as to the petitioner's 'alleged guiltiness of the said charge; and that an *ex 'parte* examination of witnesses is actually going on, under 'the authority, and force of your Lordship's power and com-'pulsitor, in absence of the petitioner, who is shut up a *close 'prisoner*, as aforesaid: That the petitioner has been advised, 'that this proceeding also is incompetent, irregular, and ille-'gal, and highly oppressive and injurious.—May it therefore 'please your Lordship, to take into consideration the circum-'stances above set forth; to recall the warrant on which the 'petitioner is committed, and ordain him to be set at liberty: 'Also, to put a stop to the precognition or examination of wit-'nesses; and to ordain the same, in so far as it has already

'proceeded, to be delivered up to your Lordship's clerk, or to 'such other as your Lordship shall appoint, in order to the 'same being sealed and retained, to abide the future orders of 'your Lordship, or the other competent Judge, or Court; or 'to give such other relief in the premises, as to your Lordship 'shall seem proper.' On that petition the Sheriff pronounced the following deliverance: *—'The Sheriff having considered 'this petition; Appoints a copy thereof, and of this deliver-'ance, to be served immediately on Mr George Monro, solici-'tor, Supreme Courts, agent for Janet Wilson; and appoints 'to-morrow, at two o'clock afternoon, for hearing counsel or 'agents for the petitioner, and for Janet Wilson, in the Sheriff's 'office; and in the meantime, sists farther proceedings in the 'precognition at the instance of the said Janet Wilson.' And thereafter, of this date, † the Sheriff pronounced as follows:—'The Sheriff having resumed consideration of the petition for 'William Hare, and having heard the counsel for William 'Hare and the respondents, Janet Wilson, senior and junior; 'In respect that there is no decision, finding that the rights 'of the private party to prosecute is barred by any gua-'rantee or promise of indemnity given by the public prosecu-'tor, refuses the desire of the petition; but in respect of the 'novelty of the case, supersedes farther proceedings in the 'case before the Sheriff, at the instance of the respondents, 'till Friday night, at seven o'clock, in order that William 'Hare may have an opportunity of applying to the Court of 'Justiciary.'—'NOTE.—The application which has been made 'to the Lord Provost, to see Burke, by the private prosecu-'tor, is not before us, but remains to be disposed of by the 'Lord Provost.' The complainer has now to submit that judgment to review, and to pray your Lordships to afford him, by suspension and liberation, the relief and redress which the Sheriff has refused. The facts are so fully set forth in the petition above quoted, that the complainer does not consider it necessary to repeat, or to add to them, or to detain your Lordships with any lengthened argument,—more especially as he expects your Lordships will appoint parties to be heard orally on the present bill. The complainer may however state, in reference to the *ratio* of the Sheriff's judgment, the petition, *1st*, That the private prosecutors themselves are perfectly aware that the public prosecutor was adopting proceedings, both as to William Burke, and as to the complainer, in relation to the alleged murder of James Wilson; but they gave no intimation of any intention on their part to insti-

* 20. January 1829. † 21. January 1829.

tain criminal proceedings against the complainer, till after the trial and conviction of Burke. *2dly*, That the ratio assigned by the Sheriff, viz.—'There is no decision, finding 'that the right of the private party to prosecute, is barred by 'any guarantee or promise of indemnity given by the public 'Prosecutor,'—supposing that ratio to be well-founded on fact, does not at all exhaust or dispose of the case; for the complainer's case arises out of circumstances, and is rested on principles which do not require to be supported by decisions, and, of which, the promise alluded to in the Sheriff's judgment, forms only a part.—Herefore, &c.

(Signed) DUN. M'NEILL.

Upon this bill, the following deliverance was given *:—

'The Lord Justice-Clerk having considered the foregoing 'bill of advocation, suspension, and liberation; Appoints the 'same to be intimated to George Monro, S. S. C., agent for 'Janet Wilson senior, and Janet Wilson junior, by delivering 'to him a full double of the said bill, and of this deliverance 'thereon; and ordains parties to be heard by their counsel on 'Monday next, at ten o'clock forenoon; and, in the meantime, 'sists further proceedings before the Sheriff in the precognition mentioned in this, the said bill.'

(Signed) 'D. BOYLE.'

Eo die.—9 P. M. Copy of this bill and above interlocutor served on me.

(Signed) GEO. MONRO.

On the same day, William Hare presented the following petion to the Sheriff, craving to be released from close confinement, and to be allowed to communicate with his counsel and agent.

Unto the Honourable, the Sheriff of the County of Mid-Lothian,

The PETITION of WILLIAM HARE, present prisoner in the Tolbooth of Edinburgh;

Humbly Sheweth,

That, of this date, † the petitioner was apprehended on a warrant of your Lordship, obtained at the instance of the public Prosecutor, on a charge of murder alleged to have

* 23. January 1829. † 19. November 1828.

been committed on the person of James Wilson, commonly called *Daft Jamie*. That, under the warrant, the petitioner was detained for examination, and having been examined, the warrant was afterwards withdrawn. That, on Friday of last week, the petitioner was again brought before your Lordship on the same charge, in virtue of a warrant granted by your Lordship on the application, and at the instance of Janet Wilson senior, and Janet Wilson junior, alleged mother and sister of the said James Wilson, alias *Daft Jamie*; and, upon that occasion, the petitioner was examined by counsel and agent, who attended on behalf of the said private accusers, while the petitioner was not allowed the benefit of any such assistance and advice: And, thereafter, on the same day, the petitioner was again imprisoned for *farther examination*, in virtue of a warrant granted by your Lordship on the application, and at the instance of the said private prosecutors. That under this warrant, the petitioner has been kept a *close prisoner*, deprived of the power of taking out letters of intimation, under the statute 1701, and deprived of the power of communicating with his counsel and agent, with a view to his defence or liberation.

That this state of *close imprisonment*, is peculiarly oppressive and injurious to the petitioner, at present; because there has been presented, on behalf of the petitioner, to the Court of Justiciary, an application for recall of the warrant against him, and for his liberation. And it is of great importance to his interest in that matter, that he should have free communication with his counsel and agent. It is unnecessary, at present, to recite the grounds of that application. They are not unknown to your Lordship, as they were the subject of an application by the petitioner, to your Lordship, two days ago, upon which you sisted the proceedings against him, to allow him to apply to the High Court of Justiciary, which he has accordingly done: That the statute 1701, enacts severe penalties, in case of wrongous imprisonment, 'and furder 'discharges all closs imprisonment, beyond the space of eight 'days from the committment, under the pains of wrongous 'imprisonment, above set down:' That the petitioner's close imprisonment having commenced on Friday, last week, *i. e.* this day eight days, he has now undergone about the utmost extent of close imprisonment, which the greatest stretch of the statute could allow: That it is only in cases of extraordinary necessity, that the permission of the statute is acted upon to the utmost stretch; and in the general case, a committment for further examination, does not continue beyond four or five days: That in the petitioner's case, there is no

reason for indulging the prosecutors with the utmost stretch of the statute; and certainly there can be no reason for transgressing it. On the contrary, in the circumstances already stated, the ends of justice require that the petitioner should be instantly relieved from the state of close imprisonment, in which he has been now so long kept, and should be allowed free communication with his counsel and agent.

May it therefore please your Lordship, to consider what is above set forth, and to release the petitioner from the state of close imprisonment in which he is at present kept, and to give him such other relief in the premises, as to your Lordship shall seem proper.

According to justice, &c.

(Signed) DUN. M'NEILL.

Upon this petition the Sheriff pronounced this interlocutor: * —'The Sheriff having considered the within petition, and the 'bill of advocation, suspension, and liberation, produced; In 'respect that the time of the petitioner's close confinement ex- 'pires to-morrow evening, and that by deliverance of the Lord 'Justice-Clerk on the said bill of advocation, suspension, and 'liberation, all further proceedings in the precognition are 'sisted until Monday next, at ten o'clock, before which time, 'the time of the petitioner's close confinement will have ex- 'pired, grants the prayer of this petition, and releases the pe- 'titioner from the state of close imprisonment in which he is 'at present kept; and appoints intimation of this petition 'and deliverance to be made to George Monro, S. S. C., 'agent for Janet Wilson, senior and junior.

(Signed) 'AD. DUFF.'

'*23d January* 1829.—Nine P. M.—Intimated the within pe- 'tition and deliverance to me,—but I understand Hare is not 'to see his counsel and agent till to-morrow afternoon.

(Signed) 'GEO. MONRO.'

The bill of advocation came to be advised by the whole Court, on Monday the 26th January,—and, on hearing counsel † for the parties, their Lordships pronounced the following interlocutor:—

* 23. January 1829.

† It is unnecessary to give the *viva voce* Pleadings of Counsel on this occasion, as the printed Informations contain the whole of the argument urged on either side of the Bar.

'EDINBURGH, 26th *January* 1829.—The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the bill of suspension, advocation, and liberation, for William Hare, and heard parties' procurators at great length thereupon; Appoint the said bill to be instantly intimated to his Majesty's Advocate; and appoint his Lordship to make such answer thereto as he shall think necessary, and therein to give such information to the Court as he shall deem proper, in regard to the situation in which the public prosecutor stands, in reference to the matters set forth in the said bill; And farther, ordain parties' procurators to give in Informations upon the subject-matter of the said bill, and debate had thereon, this day; both parties to print and lodge their respective Informations with the Clerk of Court on or before Saturday next, at twelve o'clock noon, in order that the same may be recorded, and distributed to their Lordships.

(Signed) 'D. BOYLE, *I. P. D.*'

In obedience to the above order, the following Answers for the Lord Advocate, and Informations for the parties, were given in.

ANSWERS for Sir WILLIAM RAE of St Catherines, Bart., his Majesty's Advocate, for his Majesty's interest;

TO THE

BILL of ADVOCATION, SUSPENSION, and LIBERATION, for WILLIAM HARE.

THE respondent has not failed to observe the guarded terms in which this order is conceived, calling upon him only to give such information as he shall deem proper, and thus relieving him from the necessity of questioning the power, even of this Court, to require, in this shape, a disclosure of the grounds on which the public prosecutor has been guided in the exercise of his official discretion. Influenced, however, by those feelings of respect which the respondent has ever endeavoured to evince towards this High Court, he readily submits the following statement, in deference to their wishes, on so extraordinary a case.

The murder of Mary Docherty took place on the night of

Friday, the 31st October last; and, on the evening of the following day, William Burke, Helen M'Dougal, William Hare, and Margaret Laird, his wife, were taken into custody. On Monday, the 3d of November, Burke and M'Dougal were examined before the Sheriff. These persons, as your Lordships have had occasion to know, denied all accession to the crime.

On the 4th of November, William Hare and Margaret Laird were examined by the Sheriff. In the declarations then emitted by them, they both positively denied all accession to the murder, and stated that Docherty had not received any violence from any person in their presence.

Hare and his wife were again examined by the Sheriff on the 10th of November.

They were a *third* time examined, on the 19th of November.

At these examinations, they firmly persevered in their former denial.

The precognition having been completed, was laid before the respondent, in order to be finally disposed of. A month had now elapsed since the date of the murder; during which period, the four prisoners had been kept separately from each other, but no disclosure had been made by any of them, either as to the alleged murder, or as to the participation of any of the persons accused, in offering violence to the deceased. After repeated and most anxious consideration of this extraordinary case, it appeared to the respondent that the evidence, including the examination of Medical Gentlemen, was defective, both as to the fact of Docherty having been murdered, and as to who was the perpetrator of the deed. Conceiving it of the greatest importance, for the satisfaction and security of the public, that a conviction should be *ensured*, the respondent did not feel justified in hazarding a trial, on evidence which appeared to him to be thus defective. He well knew, from long experience, how scrupulous a Scottish Jury uniformly is, in finding a verdict of guilty, where a capital punishment is to follow; and he deemed it hopeless to look for a conviction, where the fact of a murder having been committed was not put beyond the possibility of question.

The only mode by which the information essentially awanting could be procured, was by admitting some of the accused persons as witnesses against the others.

Another consideration, of still greater importance, rendered this course indispensable. Some circumstances about this time transpired, which led the respondent to dread, that at least one other case of a similar description had occurred. In such circumstances, he felt it to be his imperative duty, not to rest satisfied without having the matter probed to the bottom, and

that he should, for the sake of the public interest, have it ascertained what crimes of this revolting description had really been committed,—who were concerned in them,—whether all the persons engaged in such transactions had been taken into custody, —or if other gangs remained, whose practices might continue to endanger human life. Compared with such knowledge, even a conviction for the murder of Docherty appeared immaterial. But such information could not be obtained by bringing to trial all the four persons accused. A conviction might lead to their punishment, but it could not secure such a disclosure.

After deliberately weighing all these matters, it appeared to the respondent then, as it does to him now, that in the exercise of a sound discretion, and in the performance of his public duty, embracing equally the interest of the community at large, and of the relatives of injured parties, he had no choice left but to follow that course which he adopted.

The only matter for deliberation, regarded which of the four should be selected as witnesses.

M'Dougal positively refused to give any information.

The choice, therefore, rested between Hare and Burke; and from the information which the respondent possessed, it appeared to him then, as it does now, that Burke was the principal party, against whom it was the respondent's duty to proceed. Hare was therefore chosen; and his wife was taken, because he could not bear evidence against her.

This course having been resolved upon, an overture was made to Hare, by the authority of the respondent, with the view to his becoming a witness; and the proposal which was so made *to* him (and which did not proceed *from* him) was accepted. He was, in consequence, brought to the Sheriff's office, on the 1st of December, for examination, when, by the authority of the respondent, he received an assurance from the Procurator-Fiscal, that if he would disclose the facts relative to the case of Docherty, and to such other crimes of a similar nature, committed by Burke, of which he was cognisant, he should not be brought to trial on account of his accession to any of these crimes.

This assurance had no reference to one case more than another. It was intended for the purpose of receiving the whole information which Hare could give, in order that the respondent might put Burke and all others concerned on trial, for all the charges which might be substantiated. In giving it, the respondent acted under the impression, and on the understanding, that when offences are to be brought to light, in the course of a criminal investigation, carried on at the public instance, such assurance altogether excluded trial at the instance of any

private party. In its nature, this assurance was thus of an unqualified description, and was calculated to lead the party to believe that the *possibility* of future trial or punishment was thereby entirely excluded. The assurance was so meant to be understood.

In consequence of this assurance, Hare emitted a declaration, detailing the circumstances connected with the murder of Mary Docherty, and with similar crimes, in which Burke had been engaged. Of these, the murder of James Wilson, and of Mary Paterson, or Mitchell, were two; and it was from the facts which Hare so detailed, that evidence was obtained from unexceptionable witnesses, of such a nature as enabled the respondent to bring forward those two murders, as substantive acts, in the same indictment which charged Burke with the murder of Mary Docherty. By this proceeding, the respondent conceived that he had fully satisfied not only the ends of public justice, but the rights and feelings of all those who were connected with the unfortunate individuals thus referred to.

In the indictment, William Hare and his wife were inserted in the list of witnesses, along with all those persons whose evidence the respondent had been able to obtain, in consequence of the disclosures which Hare had made. When the respondent entered the Court on the day of trial, it was his full intention to examine Hare and his wife as to each of the three murders set forth in the indictment. How he was prevented from so doing, the Court is already aware. Had Burke been acquitted of Docherty's murder, the respondent must, in the discharge of his duty, have proceeded to try him on the other two charges; and in proof of both, Hare and his wife must have been examined as witnesses. As it was, they were both adduced on the trial, and it was from the information obtained from Hare, on the assurance of immunity, that the respondent conceives he was enabled to secure a conviction.

The warrant of imprisonment against Hare and his wife, at the public instance, has since been withdrawn, in consequence of its having turned out, after the most anxious inquiry, that no crime could be brought to light in which Hare had been concerned, excepting those to which the disclosures made by him under the above assurance related.

In regard to the crimes so disclosed, whether they were included in the indictment against Burke or not, the respondent having, in the conscientious discharge of his duty, authorized the assurance to be given, which has now been stated, apprehends that he is legally barred from prosecuting either of those persons at his instance, and he will not make any such

attempt. He need not add that he should strongly feel such a proceeding, upon his part, as dishonourable in itself, unworthy of his office, and highly injurious to the administration of justice.

Having thus, in compliance with the order of your Lordships, given such information to the Court as he has deemed proper, in regard to the situation in which the public prosecutor stands, in reference to the murders set forth in the bill of advocation, the respondent has only to add, that upon perusing the said bill, he finds no statement in it which requires any answer on his part.

In respect whereof, &c.

WM. RAE.

INFORMATION for WILLIAM HARE, present Prisoner in the Tolbooth of Edinburgh;

In His Application for

ADVOCATION, SUSPENSION, and LIBERATION, against JANET WILSON, relict of the late JOHN WILSON, and JANET WILSON, her Daughter.

THE question now to be resolved is, Whether the Informant is protected from further *criminal process*, in order to *punishment*, for the murder of *James Wilson*, alias *Daft Jamie?* The FACTS and circumstances which have given rise to the question are these:—

Certain persons, of whom the said James Wilson was one, having been murdered, or supposed to have been murdered, in the course of the year 1828, and suspicion having fallen upon the informant, and upon William Burke, *criminal proceedings were instituted by the public prosecutor against them.*

On the 19th November last, a warrant to apprehend, and for examination, was obtained at the instance of the procurator-fiscal against the informant, as charged with the murder of the said *James Wilson;* and upon that warrant the informant *was apprehended and examined.* Similar proceedings were adopted against William Burke.

Thereafter, the public prosecutor being unable to obtain evidence, or a clue to evidence, by which the facts relative to the supposed murders might be brought to light, and the perpetrators, or some of them, brought to punishment, he gave the informant *unqualified assurance and promise that he would never be brought to trial* in regard to any of these murders, provided he should make a full disclosure of every thing he should be asked and knew in relation thereto. To this assurance and promise so given, both the Lord Advocate and procurator-fiscal were parties.

Under this assurance, and relying upon it, the informant *made a full and true disclosure* of every thing he knew in relation to the several alleged murders—*that of James Wilson being one.*

The information thus given by the informant exposed the facts, and opened up the most important sources of evidence in relation to the matters alluded to, and placed the informant himself, if it was yet competent to bring him to trial, in circumstances, to say the least, of *danger and difficulty*, to which he could not, by any means, have been exposed, but for the information so given by him under the assurance above mentioned.

Through the information thus obtained from the informant, William Burke was indicted and brought to trial at the instance of the public prosecutor. The indictment charged *three* murders, whereof the murder of *James Wilson was one.*

The list of witnesses appended to that indictment contained the names and designations of many witnesses, traced through the information given by the informant, who was himself likewise included in the list as a witness; and he was cited as a witness in regard to *all the three charges.* The citation to him was given by authority of a warrant for that purpose, issued by your Lordships on the application of the public prosecutor. The informant obeyed the citation.

On the 24th of December last, the diet of compearance having arrived, and the process being, as required by law, complete, and all concerned being in attendance, the libel against Burke was, by interlocutor of the Court, *found relevant* to infer the pains of law, *as to all the three* charges. The case was now in Court, and all the parties concerned were in Court, in the respective characters assigned them. William Burke was in Court as a defender; and William Hare, the informant, was in Court, as a witness for the prosecution;—and although the prosecutor proceeded, in the first instance, with one of the charges only, (being that relative to the murder of Mary Docherty), his right to proceed with the whole of the charges, on

that same indictment, was expressly found by the interlocutor of relevancy pronounced by the Court.

The prosecutor having proceeded to lead evidence as to that one of the charges last mentioned, the informant was *sworn and examined in Court* as a witness for the prosecutor. Relying upon the assurance that was given him, he answered every *question* put by the prosecutor, though plainly calculated to operate *against himself*, (if it was competent afterwards to bring him to trial as to any one of the other charges), by connecting him with Burke,—by exposing the manner in which the murders were perpetrated, and the bodies disposed of,—and by exposing sources of evidence, and various circumstances. But the informant, relying upon the assurance that he should not be brought to trial for any of these murders, did not farther consult his own safety, and did not hesitate to answer every question put to him by the prosecutor.

That trial issued in the *conviction* of William Burke for the murder of Mary Docherty, and the pronouncing a capital sentence upon him, which sentence has since been carried into execution. The trial was very tedious; and the prosecutor did not consider it necessary to follow out the other two charges to a conviction.

The informant retired from the proceedings of that day, in the unshaken confidence that he was free from trial or punishment. In that opinion, in so far at least as regarded any of the charges contained in the indictment against William Burke, he was confirmed *by the authority of the Court, by which the law was so laid down at the trial.* It is not wonderful if, since that period, the informant's lips have not been sealed by any apprehension of being yet brought to trial upon any of these charges.

During all these proceedings, the present private prosecutors, who were not ignorant of them, took no steps, and gave no intimation of any intention to take steps, against the informant. But, on the 16th of the present month of January, a warrant was obtained from the Sheriff of Edinburgh, at their instance, against the informant, *charging him with the murder of the said James Wilson.* Upon that warrant the informant was apprehended and examined. He was thereafter committed a close prisoner, for farther examination, upon the same charge, at the instance of the same parties.

The informant then presented an application to the Sheriff for recal of the warrant; but that application was refused.

He has now applied to your Lordships, not only to review the judgment of the Sheriff, by *advocation*, but also, according to the custom of this Court, to grant him letters of *suspension*

and *liberation*. Thus, your Lordships are not confined to the question, whether the Sheriff's judgement was, in the circumstances, such as became the committing Magistrate to pronounce; but the whole matter of the commitment is brought before the Supreme Criminal Court, by an application for *suspension* and *liberation*.

Such are the FACTS; and the informant is now to state the legal grounds on which he rests his application to your Lordships.

The informant, in one word, maintains, that on account of the promise and compact, whereby, under assurance of safety from trial or punishment, he disclosed to the public prosecutor all the information he possessed, and was made a witness, and examined on the trial of William Burke, he cannot now be tried in order to punishment for the murder of James Wilson.

But, as a hint was thrown out at the debate, that the present is not the most fitting time or shape to raise this question, and that the informant should remain quiescent, until an opportunity shall be afforded him of stating an objection in bar of trial, when criminal letters shall, at the convenience of the private prosecutors, be raised and called in Court, it is proper to state shortly the grounds on which the informant submits that this hint is entitled to no regard.

In the *first* place, the question which the informant has raised, is an incidental one; and at whatever time, or in whatever shape it may be taken up, it must be preliminary to the matter of trial. It must be considered, investigated, and disposed of completely, before the matter of trial can be at all entered upon. There is, therefore, no reason even of convenienсy or expediency for postponing the one until the other shall be ready to be entered upon; and there is no rule or practice of Court to that effect. In the *second* place, the informant has a very material and legitimate interest, that the question should be considered *now*, in order that, if he is right in this question, he may be relieved from the serious burden of *preparation for trial*. He may also be permitted to remark, that the prosecutors can have no *legitimate* interest to postpone the discussion of this question. It cannot be disadvantageous to them, but the reverse, that the merits of the informant's objection to the proceedings against him, should be ascertained and disposed of, before they incur the expense, and undergo the labour of preparing their case for trial. In the *third* place, the informant, with confidence, submits that, if he cannot be

tried for the murder of Wilson, he cannot be kept in prison *in order to trial for the murder of Wilson*. There is no alleged reason or object for his imprisonment, except the intention to bring him to trial and punishment; and if that reason or object is not a legitimate one, the imprisonment or detention cannot be legal. The informant has an obvious interest and right to apply to be released from an imprisonment which he has such grounds for maintaining to be illegal. But that release, supposing him to be entitled to it, he may not obtain, and cannot enforce in less time than 140 days, that is to say, between four and five months, by the course suggested by the prosecutors, or by any other course than that which he has adopted. Finally, the course which the informant has adopted is, in truth, the *only* one by which he can enforce his liberation, or the discussion of his claim to liberation at all, unless by *demanding a trial*—the very thing he holds to be incompetent and illegal, or at least to be a proceeding which would expose him to dangers and hardships, to which, in the circumstances, he is not bound to submit, and cannot be legally subjected. Upon these plain grounds, the informant submits that he has chosen the proper time, and the proper shape, to bring his case before your Lordships.

Before entering upon the main grounds in argument, upon which the informant rests his claim for immunity from trial, it may be proper to dispose of another observation made by the prosecutors, in the course of the debate. It was more than once stated for them, with some degree of triumph, that the informant's plea necessarily rests upon an inversion of the ordinary presumption of law, which is for innocence—that the informant must begin by admitting or assuming that he was received by the public prosecutor as a witness, *socius criminis*, and, consequently, is guilty of the murder of James Wilson,—a matter of which the present private prosecutors allege that they are totally ignorant, and say nothing. The relevancy of this observation is not apparent; and the supposed dilemma into which it is intended to reduce the informant, is really one of the most harmless that can be imagined. Even if the informant should concede the point of participation in the murder of James Wilson, that would be no objection to his present plea, and could be no reason for deciding the present question against him. But, in truth, it is not necessary for the informant to make any such concession, or to assume any such state of the fact. It is enough that, by the disclosures he made, and the evidence he gave, under an assurance of perfect protection from the law against any future punishment or trial, he has placed himself in circumstances of suspicion

and danger, which render his defence difficult, burdensome, perplexing, and precarious. On the other hand, if the prosecutors do not accuse the informant of having been concerned in the murder of James Wilson—if they do not prefer such a charge against him—if they do not found upon his alleged guiltiness in the matter—why have they incarcerated him upon that charge? Why is he now detained a prisoner at their instance upon that charge? Why do they now oppose his liberation, and the recall of the warrant at their instance proceeding upon that charge? In short, *if they* do not charge the informant with the murder of James Wilson, there is an end of the question, and there is no occasion to go farther into the discussion—the warrant must be recalled, and the informant must be liberated forthwith. The prosecutors are here only in virtue of the assumption *by them*, that the informant was concerned in the murder of James Wilson; and *they* cannot be allowed to plead any thing inconsistent with that assumption, whatever may be permitted to the informant.

Having disposed of what may be called the preliminary matter introduced by the prosecutors, the informant shall now proceed to submit the grounds of his plea.

There were certain points conceded in argument; and it may be convenient, and tend to narrow the discussion, to state these in the outset as *postulates*.

1*st*, It was conceded, that it is the established law of Scotland, for which there is abundant authority and practice, (at what time, or in what manner introduced, is a different matter), that a *socius criminis*, who has been examined as a witness in a trial at the instance of the *public* prosecutor, and who has fairly answered all the questions put to him, cannot himself be brought to trial or punishment for the offence as to which he was so examined as a witness—that he is completely protected by the law against such trial or punishment: For instance, that the informant is protected by the law from any trial or punishment on account of the murder of Mary Dochesty.

2*d*, It was conceded that this state of the law cannot be traced very far back; and that the admission of a *socius criminis* to give evidence at all, is not of very ancient origin; and that there is no positive statute to which the change in the state of the law, in these respects, can be referred.

3*d*, That this protection extends only to witnesses brought by the *public* prosecutor, and does not extend to witnesses brought by the party accused.

4th, That the law of England in this matter is different from the law of Scotland, and does not give any such absolute protection; but that the party there giving evidence has an equitable claim for a royal pardon.

The rule of the law of Scotland, to the extent above mentioned, being admitted,—and this rule having obtained its place in the law, at no very distant period, and without any positive statute,—it must be referable to some pre-existing principles in the law, by the operation and influence of which it must have been introduced and received. The informant shall endeavour to trace those principles, and to shew that they no less fully bear out the claim which he now makes for protection from trial or punishment.

This inquiry bears upon two branches of the law, which, more perhaps than any others, are distinguished by the regular and steady progress which they have recently made towards a more perfect state, accommodating themselves, by almost insensible degrees, but without resistance, to the progress of improvement, the change of manners, and the state of society and of police. The two branches of the law now alluded to are, that which relates to the admissibility of evidence, and that which relates to prosecution and punishment for crimes, especially as affecting the relative rights, powers, and interests of *public* and *private* prosecutors.

To the latter of these, it is important to attend carefully.

When an offence is committed against the law, *e. g.* when a murder is committed, *two* interests and claims arise,—1st, The interest of the *community* to maintain the law and police by *punishing* the offender, in order to 'deter others from committing the like crimes in all time coming;'—2d, The narrower but more personal interest of the individual injured by the offence, to claim satisfaction for the injury done to him. It is unnecessary, in the present discussion, to go back to that imperfect state of society and government, where the interests of the community, in such cases, were left to be enforced by any member of the community who might choose to assume the right or task of vindicating them. It is not necessary to dwell upon the motives which wisely prompted a restriction of such right of prosecution to those who, from natural feelings and immediate interest, were most likely to be active in vindicating the rights of the community, and their own claims for satisfaction, to the exclusion of those who, from the wideness of their interest, were seldom likely to bestir themselves, except for the purpose of gratifying individual resentment, or indulging individual malice,—motives which every system of jurisprudence, as it advances towards perfection, tends to restrain, and, if

possible, to exclude. Neither is it necessary to enlarge upon that state of law in which the public and the private interests, being committed to the limited few last alluded to, were under no other control whatever,—the victim of their animosity or persecution being surrendered into their hands, to be dealt with at their pleasure.

Experience of the disadvantages of such systems, and the growth of wisdom and improvement in government and jurisprudence, have given rise to a far better system, in which the interests of the community are more effectually protected, and its claims more certainly enforced, while the grosser elements of malice and revenge are almost totally excluded. In this country, which boasts a system of criminal jurisprudence more perfect in principle and in practice than belongs to almost any other country, the interests of the community are, and, for a long time past, have been, committed to a *public prosecutor*, whose duty it is to watch over these interests, and to claim, on behalf of the community, the debt due to it by every one who is guilty of an infraction of the laws by which the community is governed, and to enforce that claim in the degree which the law permits, and which the interests of the community require. At the same time, this system is without prejudice to the legitimate right of the party injured to claim and to obtain satisfaction for the wrong done to him in his feelings or in his estate. Nay, there even yet remains to such private party a right to enforce the debt due to the community, in a certain form, and under certain restrictions, when the public prosecutor, to whom the interests of the community are entrusted, has neglected to interfere or to attend to those interests. This remnant of the former system is perhaps a wholsome check; and it may have been essential on the first institution of the office of public prosecutor, which brought along with it a restriction of, or an encroachment on, the powers which the community had till then committed, exclusively to the party injured; and, in cases of homicide, to the relations of the deceased.

The institution of the office of public prosecutor necessarily introduced a separation of the two distinct interests and objects connected with prosecutions for crime, the care of which had been previously committed to the same persons. The line of distinction thus introduced, has been every day becoming more and more marked, as the law and the administration of it have advanced in improvement. The public prosecutor watches over the interests of the community, in regard to prosecution for *punishment*; and he cannot be controlled or hindered by the private party. But the private party has an

absolute right to sue for composition or reparation for the injury done to his feelings or estate; and, in this suit, he cannot be controlled or hindered by the public prosecutor. An offence committed raises two interests; and the offender owes two debts, one to the community in the shape of *punishment*, to deter others from committing the like crimes; the other to the individual injured, as a *satisfaction* for the injury done. In regard to the first of these, the public prosecutor is the creditor, who acts for behoof of the community, with whose interest he is entrusted, and who prosecutes, *ad vindictam publicam*. It is his duty, and his right to take the steps most beneficial to the community, to avenge the wrongs done to the law and to the state.

It has already been said, that, in certain circumstances, and under certain restrictions, the private party injured may still assert the right and claim of the community for *punishment*. But it is a total mistake to assume, as the private prosecutors in the present case do, that the rights and privileges of the private party are as absolute, free, and unrestrained, as those of the public prosecutor. This position is true, only as to the private party's separate right to prosecute for assythment; but it is not true of the private party, when he comes forward to assert the rights of community as to punishment, and prosecutes *ad vindictam publicam*. The object of prosecution for *punishment* is declared, by the very words of style in *all* criminal libels, to be 'to deter others from committing the 'like crimes,'—an object avowedly of a public nature, for the interests of the community at large, and not of any particular individual, forming a part of that community. When the attainment of this object is the purpose in view, the law draws the most marked distinction between the public prosecutor and the private party. It places the greatest confidence in the public prosecutor, who appears as the representative of the whole community, to vindicate the rights of that community;—to maintain the law, and preserve peace and good order, without any personal or selfish motive, or feeling. It affords him *every facility* in the discharge of his duty, and the accomplishment of his object, consistent with JUSTICE TO THE PERSON ACCUSED,—an object which no good system of law will ever lose sight of, or regard as secondary. But, on the other hand, the law looks with great jealousy on a private party, who does not confine himself to his own proper and personal right of claiming reparation, but who comes forward to prosecute *ad vindictam publicam*,—who calls for the infliction of *punishment*, 'in order to deter others from committing the 'like crimes.'

Accordingly, since the first institution of the office of public prosecutor, every step which the law has made, has had for its object the placing criminal prosecutions for *punishment* under the more absolute direction of the public prosecutor, and the restraining of private parties from instituting such prosecutions, or interfering with the proceedings of the public prosecutor, for the public interest.

Thus, the law does not require the public prosecutor to find caution before he institutes his suit; but the private party is required, before he is allowed to prosecute *ad vindictam publicam*, to find caution that he shall faithfully discharge to the public the task he is about to undertake, and shall not compromise the interests of the community for any selfish object. Again, the law does not require the public prosecutor to give his oath of calumny; but it requires a private party who comes forward to prosecute *ad vindictam publicam* to give such oath, thereby affording a check against parties who pretend that their object is to vindicate the rights of the community, while, in truth, the object may be private and malicious. Again, the law does not subject the public prosecutor in expenses of process; but more than one statute has been passed for the purpose of subjecting in expenses a private party, who rashly or wantonly steps forward as the champion of the community. Again, the law does not exclude the right of the public prosecutor to adduce his own nearest relations as witnesses, or the nearest relations of the party injured, or even that party himself, the object of the prosecution for *punishment* being 'to deter others from committing the like crimes,'—a public object for behoof of the community at large, and not for the separate advantage or interest of any separate individual in it. Again, the law allows the public prosecutor to proceed in his prosecution by *indictment*, issuing from himself, without any bill or supplication to the Court, or any warrant from the Court. But a private party cannot so proceed. He must present an application to your Lordships, praying you to give him a criminal libel, and which criminal libel he cannot get unless the public prosecutor shall *concur* in the application,—so completely is the matter of prosecution for *punishment*, a matter in which the community at large has the real interest. Finally, the public prosecutor may, at any stage before sentence, *restrict* the capital pains of law to an arbitrary punishment; but there is no authority for holding that the private party can do so of his own mere act. Here the informant, in passing, may allude to the case of Colonel Charteris, which was referred to by the other side, as an instance of a prosecution by the private party being permitted to proceed after the public prosecutor had with-

drawn his concourse. The case of *Colonel Charteris*, even had it been without specialty, would scarcely have been held to fix the law. But that case was attended with specialties which excluded any general question as to the power of a private party to *raise* a criminal prosecution for punishment, without the concourse of the public prosecutor. In the *first* place, in the case of Colonel Charteris, the public prosecutor *had given* his concourse at the proper stage, and the private party, in consequence thereof, had obtained his libel, and was so far advanced with his cause before the public prosecutor withdrew his concourse. Consequently, the only question between the private party and Colonel Charteris was, whether the withdrawal of the concourse, or the attempt to withdraw the concourse, (for it may be doubted whether, if once given, it can be withdrawn any more than the *fiat* of your Lordships to the bill, or the signet to the criminal letters), could destroy an action competently raised and insisted in by the private party who, having once got into Court, was truly *dominus litis*. But, in the *second* place, the case of Colonel Charteris related to a charge of *rape*, as to which there is a special statute, giving power to the woman's parents and relations to prosecute, although the injured party herself should consent to pass from any pursuit: and that statute was founded on. But whatever may be the state of the law as to the concourse of the public prosecutor, which is not here the proper subject of inquiry, it is certain that, in *all the particulars above enumerated*, and many others, the law draws a distinction between the public prosecutor and a private party, and *always in favour of the public prosecutor*.

The private prosecutors here are equally under mistake when they assume that the public prosecutor cannot do any thing which is to have the effect of preventing the private party from prosecuting for *punishment*. When an offence is committed, the duty of the public prosecutor is to proceed in the matter with a view to the interests of the community in relation to the wrong done, without regard to the effect his proceedings may have upon the power or right, if such exists, of a private party to come forward and prosecute for punishment. The interest of the community in the matter of *punishment*, is the paramount interest, and the only *ultimate* interest, which the law can regard; although different persons may, under certain circumstances, be permitted by the law to vindicate that interest. The public prosecutor, as being the person entrusted with the interest of the community, and as representing the community, has the *primary* right to take up the matter; and, having commenced proceedings for behoof of the community, he cannot be stayed or hindered, or impeded in his prosecution

for punishment, by any right or any interest which any private party can claim; and he may do, and daily does, many things which exclude the private party from demanding punishment.

For example, 1st, If the public prosecutor shall prosecute the offender, but shall fail to obtain a verdict, the private party cannot demand punishment as a separate debt due to him, or a separate right vested in him apart from the community. 2d, If the public prosecutor shall obtain a verdict against the offender, but shall restrict the pains of law, the private party cannot demand the full pains of law as a right belonging to him individually, which the community or its representative, the public prosecutor, cannot infringe upon. 3d, If the public prosecutor shall obtain a verdict against the offender, but shall not move for sentence, conceiving that the interests of the community have been sufficiently asserted by imposing upon the offender the burden and disgrace of trial and conviction, and shewing others that the law reaches the act, the private party cannot prosecute for punishment. 4th, If the public prosecutor shall prosecute one of two *socii*, and shall use the other as a witness on the trial, (in the doing whereof he cannot be controlled by any one) the private party cannot prosecute for punishment, the *socius* so used as a witness.

On the other hand, none of these proceedings on the part of the public prosecutor, acting for behoof of the community, can exclude or infringe upon the inherent personal right and interest of the private party to prosecute for *assythment* or *satisfaction*. That right belongs to him as an individual, not as a member of the community at large. He claims *that*, not 'to 'deter others from committing the like crimes,' but to solace *his own* feelings, and redress *his own* wrongs. That is not a matter of *punishment*, but of *satisfaction*.

In regard to the matter of *punishment*, properly so called, the right, if any, of the private party, is secondary, and yields to that of the community, asserted through its proper officer and representative. The private party cannot take a single step towards prosecution for *punishment* without giving notice to the public prosecutor, and applying for *his concurrence*; and if the public prosecutor shall even then take up the matter, the private party is superseded by the proper representative of the community coming forward to demand the debt of punishment, which can only be paid once, and which is due only to the community, whether the demand be made by the public prosecutor, or, failing him, by the private party, who, in certain circumstances, and under certain restrictions, is permitted by the community to assert its rights. In the first

instance, however, the public prosecutor is the proper representative of the whole community in demanding *punishment*. If he abuses his trust, he is responsible in the proper quarter.

When the door to the admissibility of evidence was not opened so wide as it now is—when many grounds of exclusion existed, which the improved notions of modern times have gradually and silently, but effectually, done away, *socii criminis* were not admitted as witnesses. The stain of character, and the bias of interest, were considered sufficient grounds for excluding them; and the state of crime, in regard to frequency, secrecy, and dexterity of perpetration, did not render the reception of them so often necessary towards the detection and punishment of some of the offenders. But, for a considerable time past, it has been found essential to the ends of justice to make use of *socii criminis*, in order to bring others to punishment. To secure the punishment of some, it was found necessary at times that the community should abandon its claim to the punishment of others. But the *necessity* in *particular cases*, was not the only recommendation of this system; certainty and rapidity of detection are far more important matters in criminal police than extent or severity of punishment. The obvious policy of sowing distrust among associated violators of the law, powerfully recommended to the community the advantages to be derived from abandoning its claim for punishment against some of the delinquents, in order to have the benefit of the information and testimony they could give to bring others to justice. It is manifest, however, that the community could not obtain the benefit of the information and testimony of any such person, without relinquishing the claim which the community had against him for *punishment*; because, by giving such information and testimony, he would be exposing himself to dangers, in case of trial, which would not otherwise have surrounded him, and to risk of punishment which might otherwise never have reached him. A *compact* was necessary between the community and the individual, whereby the community, to have the benefit of his information and evidence, surrendered and discharged the claim it had against him for punishment; and this for the double purpose, 1*st*, of leaving him in safety to speak out; and, 2*dly*, of discharging the interest, the existence of which would detract from the effect of his testimony. Accordingly, the practice of using *socii criminis* as witnesses is perfectly established; and that they are thereby absolutely and completely protected against *punishment or trial*, is also established, and is conceded in the present argument.

But *who* is to make the *selection* among the *socii*? WHO is

to determine which of them is to be received as a witness, while the other is to be selected as the object for punishment,—as the individual who is to pay the debt due to the community? The *public prosecutor must make the selection.* It is *inherent in the nature and duties of his office to do so.* He represents the community,—he is entrusted with its interests in the matter of prosecution for punishment,—he must prepare his case in the manner most conducive to the interests of the public,—in the manner best calculated to insure the claim of the community, to exact payment of the debt from one or more of those who owe it. He must, therefore, judge, whether the interests of the community are to be best secured by prosecuting the whole of the debtors, or by taking the benefit of the information and evidence of one of them against the others;—a benefit which cannot be obtained except by discharging that one from the claim which exists against him. The *public prosecutor* then must *select;* and, in practice, he *does so* every day. He makes his selection *without control of any one.* He does it upon his *own* responsibility; and it is admitted, that when *he* places a *socius criminis* in the witness' box, and uses his evidence against a prisoner, the act of the public prosecutor, thus done upon his own responsibility, in virtue of his uncontrolled, and, in this respect, uncontrollable power, as representative of the public interest, is binding upon the community,—is binding in law. The debt of punishment which the *socius* owed to the community, is, by this act and transaction of the *public prosecutor* representing the community, completely and for ever discharged,—no punishment can ever reach him,—he cannot be put on trial any where, by any one, in order to punishment.

In the present case, the public prosecutor having laid his hands upon certain persons as *socii*, and being unable, from defect of evidence, to make out a case against any of them, adopted the course which has now been described. He made his selection. He, as representative of the community, relinquished the claim of the community against one, in order to secure to the community the claim against the other. He assigned to one the place of *witness*, to the other that of *defender*. He, as representing the community, entered into a compact with the informant, whereby all claim against the informant for trial or punishment was discharged, and assurance of safety and protection was given to him; and the informant, in consideration thereof, made disclosures for the good and interests of the community.

This was a compact entered into by the informant, not with any private party, who could act only for his own personal or

peculiar interest, but with the representative of the community, acting for the public interest and good, for which all criminal law is created and administered, and, in particular, all prosecutions in order to *punishment*, are conducted. The representative of the public interest, considered it essential to that interest, to make this compact with the informant; and, on the other hand, the informant having made the compact, *implemented his part of it.* The compact *was acted* upon. The informant made disclosures, and pointed out witnesses, and sources of evidence, which have been published to the world: He appeared in the witness' box, and gave evidence in open Court. In short, he fulfilled his side of the agreement, as far as the public interest required; and he is willing to go through with it to the uttermost. But, by what he has done, he has *changed his own situation completely.* He has, in the event of his being put upon his trial, *surrounded himself with danger*, to which he could not have been exposed, and to which he would not have exposed himself, but for the compact by which he secured himself against trial; and, in return for that assurance, gave to the community the benefit which it wished to have.

In short, the compact *has been acted upon*, and *matters are not entire.* The informant *cannot*, to use the words of the Lord President, in the trial of Downie, '*be put back to his former* '*situation.*' He is, therefore, protected from trial. This is the true *principle* of the protection which the law gives to a witness, *socius criminis.* It is the result of a compact with the public, for the public interest. The public relinquishes its claim against the individual, in order to have the benefit of his information, and evidence to enforce its claim against another of the debtors. It cannot get the benefit of his information, without relinquishing the claim against him,—1*st*, Because he will not give the information, without such a stipulation; and, 2*dly*, Because the information or evidence given by him, cannot be considered equally pure, until the interest is discharged; and that interest can be discharged by the creditor entitled to enforce the claim, and by no other person. After the compact between the *socius* and the representative of the public interest is concluded and *acted upon, and matters are no longer entire, and the* socius *can no longer be put back to his former situation*, the public faith is pledged,—the compact cannot be recalled from,—the *socius* is *entitled* to the protection for which he stipulated; and more especially, this is the case when the compact has been acted upon in open Court, in presence of your Lordships.

That this is truly the principle to which the protection con-

fessedly given by law to a *socius criminis*, as matter of right, is to be traced—that it is truly a *compact* with the *public prosecutor*, for the public interest—appears from a variety of considerations. In the *first* place, That it is a *compact*, appears not only from what has been already stated, but is confirmed by the very authority relied on by the private party in this case, viz. the opinions expressed by the Judges in the case of Downie, that the protection does not hold, if the witness *refuses to speak*, *i. e.* refuses to implement his part of the compact. In the *second* place, That it is a compact with the *public*, appears from the circumstance, that the protection does not hold in the case of a witness called by the party accused, nor, in so far as any authority can be found, does it hold in the case of a witness called by a private prosecutor. It is the acting of the *public prosecutor*, for the interest of the public, that gives the protection.—(Burnett, p. 418.)

This compact is implied from the very act of examining the *socius* as a witness in Court; and justly so; because, in the *first* place, In a matter so delicate, it is to be presumed that no individual would be placed by the public in such a situation, except upon the understanding that the public had abandoned all claim for punishment, in consideration of the benefit it received from the information given by the individual. In the *second* place, Because the public prosecutor is presumed to bring forward his evidence in the state which entitles it to the greatest credibility; and is, therefore, presumed to have discharged the *interest* which created an objection to credibility. This is not the act of the Court; because the Court cannot discharge the claim or right of any party. The creditor in that claim can alone discharge it; and, in this case, the creditor is presumed to discharge it from the very act of bringing forward the witness. In such a case, though the Court is not, and cannot be any party to the compact, whereby the prosecutor discharges his claim against the witness, still the compact being judicially acted upon, the Court itself is witness to it. It has judicial knowledge of the compact; and it will, upon its own knowledge, maintain and enforce the observance of so sacred an agreement, if any attempt should be made to violate it. But the compact is not less sacred or binding, though made out of the presence of the Court, if the fact of the compact, and of its having been acted upon, shall be proved to the satisfaction of the Court. The principle is precisely the same. For instance, let the case be put of a *socius* examined as a witness in another court, in a prosecution at the instance of the public prosecutor, for a homicide; your Lordships are no parties to that proceeding, and are not witnesses

to it; but, on proof of it, you will protect the *socius*, should any attempt be made to violate the compact, by prosecuting him for punishment. In short, the compact having been entered into and acted upon, the *socius has secured his protection*, otherwise there would be no effectual protection at all; because the community having, through its public prosecutor, relinquished its claim, and extracted the information by which alone guilt could be brought home to the *socius*, might still enforce the claim for punishment, by allowing one of its members, the private party, to conduct the prosecution with the aid of that information so obtained; and that is, in fact, what is now attempted; though, in this instance, without collusion on the part of the public prosecutor.

In the present case, the compact was acted upon, not only by the informant disclosing every thing he knew, and pointing out all the sources of evidence, which the very indictment against William Burke, and the list of witnesses thereto appended, disclosed and made accessible to any one who might have the disposition and the right to avail himself of it; but the compact was farther acted upon by the informant appearing and answering every question put to him in the witness' box. The force of this fact is not elided by saying that no questions were then put to him as to the particular case of *James Wilson*, and that what he then spoke will not afterwards be proved against him. In the *first* place, He had already disclosed all he knew as to the case of *James Wilson*,—he was cited as a witness in that case,—it formed one of the charges in the indictment then in Court; and it was by no breach of compact on the part of the informant—by no fault of his, that his evidence did not relate specially to the case of Wilson. The evidence *did relate to facts common to all the cases in the indictment*, and which would materially prejudice him should he be put upon his trial for the murder of Wilson; and the list of witnesses procured through the informant, and given to the world, related to the case of Wilson. In the *second* place, The protection which belongs of right to a witness *socius criminis*, is a *total exemption* from trial for the crime, and is not limited to prosecution at the instance of any particular party, or in any particular court, or merely to abstaining from proving against him upon trial, what he said when examined as a witness.

The informant, then, is within the *principle* of the rule which protects a witness *socius criminis* from trial. He has entered into a compact with the representative of the public interest,—that compact *has been acted upon*,—the informant has made disclosures, and given information, both preparatory to

trial, and in the witness' box, which would *injure him* in his defence, if he should now be put upon his trial,—matters *are no longer entire*. He has *implemented* his part of the compact; and all that he demands is, that there shall be no *breach of the public faith* towards him,—that he shall not be put upon his trial, when it is *now no longer possible that he can have a fair trial*.

Having thus endeavoured to shew, that the principles upon which the law gives protection to a witness *socius criminis*, and which are admitted to be founded in 'humanity, justice, 'and policy,' bear out the claim which the informant now makes for immunity from trial, he begs the attention of your Lordships to the only *direct authority* recorded upon this point. It is not wonderful that there should be a scarcity of direct authority upon the subject; because, in the *first* place, it is believed that this is the very first attempt ever made to commit such a gross violation of faith and justice. In the *second* place, although there may have been many cases in which a *socius criminis*, cited as a witness to several acts charged in the same indictment, was examined only as to one, it not having been found necessary to proceed as to more, and where it has been laid down from the Bench, and acquiesced in by all parties having interest, that such witness was absolutely protected by the law from prosecution for punishment as to all or any of the charges contained in that indictment, and that his evidence was not tainted by the interest which a different state of circumstances could have induced,—still no record of these authorities is preserved; because we are very scanty in reports; and, indeed, until very recently, we have not seen any thing like an attempt at a regular system of reports of the proceedings in criminal trials. This is a thing much to be regretted, for many reasons. But there is one case fully reported, which contains the most direct authority on the point now under discussion: It is the trial of William Burke,—the very trial which has given rise to this discussion; and the authority to be referred to relates to the very matter of this informant's protection from trial and punishment.

In that trial, the counsel for the prisoners, in addressing the jury, argued an objection to the credibility of the informant, on the ground that he was himself liable to prosecution and punishment for the two other charges contained in that indictment, and, consequently, had a direct and material interest to convict the prisoners, and destroy the evidence by which those charges could be established against the informant himself. This point was argued with great zeal; and no small portion of the defence of the prisoners was rested upon it. It was a legal ob-

jection to the credibility of the witnesses, and, if well founded in law, was of great importance to the case. Upon it depended the degree of credit which the jury should give to two of the direct witnesses in the cause. The point being raised in this *the most important shape in which it could have been raised*, and in the stage most efficacious for the prisoners, as no reply to the argument could then be put in, it became the *duty* of the Court to consider the objection well, and to direct the jury as to the law applicable to it. Now, observe how the Court laid down the law on that point, as announced by the presiding judge in his charge to the jury:—'It has been further argued 'that *Hare* and his wife were placed in the situation of being themselves exposed to be tried for other charges of 'murder, and indeed for *the other two charges contained in the 'present indictment;* hence that they have a clear interest to 'throw the blame of the actual perpetration of the crime on the 'prisoners, and represent themselves as comparatively or completely innocent. But here, gentlemen, I feel it necessary to 'state to you, *as the decided opinion, both of myself and my 'brethren now present*, that, whatever may be the case with 'regard to *other* murders, or other crimes, the witnesses in 'question are as *fully protected by the law*, in relation to *all 'those contained in the present indictment*,—that is to say, against either *trial* or punishment for them,—*as if they had 'been entirely free from any concern in their perpetration.* These 'persons are called on to give evidence on the whole of the 'charges contained in the indictment. Eventually, and at a 'subsequent diet, they *may* still be examined in relation to 'the other two; and, therefore, so far as the plea of interest 'is rested on the *alleged danger* to which they are exposed, 'it is *entirely and thoroughly without foundation.* The *public 'faith has been pledged to these persons*, wicked and criminal 'as they may be, and certainly are; *and it must, at all hazards, be kept sacred.*'

Nothing can be more clear and express than this,—nothing can be more consistent with the principles, or with the result for which the informant is contending. The Court declared that the public faith was pledged, and must, at all hazards, be kept sacred; and the legal result was declared to be the perfect protection of the informant from trial, in order to punishment. It is not limited to trial at the instance of the *public* prosecutor; nor could it, if so limited, have supported the legal conclusion of the Court, that the objection of interest rested on alleged danger, was groundless. The protection from trial, for any of the charges in that indictment, was declared to be full and complete.

It is impossible to conceive any authority more directly applicable to the case in hand, or partaking more of all the characters which give weight to any authority. If the informant had been able to cull such a passage from the report of the charge of the presiding Judge, in any case tried years ago, the application of the authority, and the influence of it upon the present question, could not have been disputed or resisted. But surely the *recentness* of the authority can never be argued, as detracting from the weight of it, but the reverse. The circumstance that it related to the *very question* of the informant's liability to trial, as to the identical charge for which he is now attempted to be brought to trial, cannot be held to detract from the weight of the authority, or from the applicability of it, but the reverse; or if it excludes the possibility of any speciality, or any separate element. It is worthy of notice, too, that the law was thus laid down in the *most important* part of the whole proceedings in the trial,—it was laid down in the direction of the Court to the Jury, on a point of law affecting the credit which they were to give to certain witnesses in the cause; and it is not assuming too much to say, that the *verdict of the Jury* may have depended, and, in all probability, *did depend, upon the circumstance of the law being so laid down*; and, consequently, that *the life of the prisoner then under trial, and which has now been forfeited, rested upon that point.* This, too, was the law promulgated, not by *one* Judge sitting at circuit, unaided by the counsel of any of his brethren,—it was the deliberate opinion of a quorum of the Supreme Criminal Court,—of *three* of your Lordships' number, who not only concurred therein, but who sat there to give the law, which the presiding Judge *could* only dispense, in conformity with *their* opinion. Such, then, *was* the law on *the 25th of December last*; at least, such was *then* laid down and acted upon as law by the Supreme Criminal Court,—by *three* of your Lordships' number, when *the life of a prisoner was at stake.*

An attempt was made by the other party at the debate, to point out an inconsistency between the law thus expressly laid down in the charge to the Jury, and the legal *inferences* to be deduced from the proceedings in a previous part of the trial, when certain questions were put to the informant by the counsel for the prisoners. It is only necessary to attend to those proceedings, to see that your Lordships were not guilty of the inconsistency which is ascribed to you. When the witness was introduced, it is true, he was desired to speak only to the case of Docherty; but it will be in the recollection of your Lordships, that this warning was given at the desire of

the counsel for the *prisoners*. Afterwards, when the examination in chief of the prosecutor was concluded, a course of examination was commenced on behalf of the prisoners, *avowedly not cross*, to the examination in chief, but intended to test the claim of the witness to credibility, by asking him 'to reveal 'his whole life and conversation;' and, in particular, to ask him 'whether he had ever been guilty of, or concerned in, 'any *other* murder.' Your Lordships held, that though the question might be put, the witness was not bound to answer it; and the informant has no objection to hold, that the principle of this decision may have been, that the question, if answered, might lead the witness to criminate himself, in regard to matters as to which he had *no protection*. But observe the *nature* of the question, and the *quarter from whence* it proceeded. In the *first* place, the question and whole inquiry was confessedly not limited to the matter set forth in the indictment,—it was intended to ask the witness 'to reveal his whole life and con-'versation.' The witness might have been concerned in murders not set forth in the libel,—not embraced in his compact with the public prosecutor; and the question was, in no respect, limited to the matters as to which he was protected. It was so framed, as to embrace, to use the words of Lord Mackenzie, 'other crimes than *those* in reference to which 'he has been brought forward.' In the *second* place, this *unlimited* question *proceeded from the prisoner;* and it is undisputed law, that there is *no protection* to a witness, relative to what he shall say when examined by the *prisoner*, as to crimes in relation to which the public prosecutor has not made him a witness. It is plain, therefore, that there is no inconsistency in the proceedings; and that the law, as laid down in the charge to the Jury, is not at variance with any authority which can be found in the report of that trial, or of any *other trial*.

The principles of law, and the direct and recent authority now stated, are sufficient, it is submitted, to govern this case.

Even if the principle of law and the authority referred to, had been less plain and satisfactory than they are, the informant might, with great confidence, have rested his case on the principles of '*humanity, justice, and policy*,' which are said, on the other side, to be at the foundation of the rule of law, which secures protection to a witness, *socius criminis*, and which, indeed, pervade, and are interwoven with, every part of the criminal law of Scotland, and may legally be appealed to in the absence of any other guide. Every thing adverse to these principles, and certainly every *novelty* adverse to them,

must be repugnant to the spirit of the law. The proceedings which the informant now resists are of this character; while the prayer he has preferred to your Lordships, is plainly in unison with those great principles which are at the foundation of our criminal code, and are intermingled with the administration of it. Your Lordships have before you the case of a prisoner who has had the misfortune to be accused by the public prosecutor of acts of murder, of which he may have been innocent or guilty. Let it be taken either way. Suppose him to be, as his adversaries describe him, a delinquent polluted by crimes of the blackest die—one of a fraternity who conspired against the lives of the lieges, and who carried on the work of blood with a secrecy and a success which the firmest cannot hear without trembling, or the hardiest without horror—let the prosecutors describe his character and his crimes in any language they please—still, in his case, as in every other, *justice* must be observed, and the law must be administered in the spirit of *humanity*, and with a view to future consequences. If he has really been a member of such a conspiracy as is alleged, the greater is the benefit which he has conferred upon the public, by laying open all the hidden acts and secret ramifications of that confederacy, and the greater the danger to which, in the event of trial, he has exposed himself, by giving any information or any evidence whatever in regard to any of its transactions and deeds. But he made a compact with the representative of the interests of the public; and he has given to the public, by their representative, the benefit of all his knowledge of these transactions, in consideration of the community having released him from all claim for punishment. This compact having been acted upon,—every information which the informant possessed, having been drawn from him,—he having been publicly called upon to appear as a witness in regard to the very murder now under consideration,—he having been placed in the witness' box, and having publicly given evidence in relation to a part of those proceedings, to which he is said to have been accessary, and having thereby publicly connected himself with the chief actor, whose conviction he ensured; and having exposed the system, and laid open the sources of evidence, and thus furnished the means of bringing himself to trial, if that were competent,—borne down with difficulties, and surrounded by perils, by which he would not otherwise have been environed, —the strength of his defence impaired or taken away—is it consistent with humanity, or justice, or policy, that two individual members of the community, who all the while lay

by without giving notice of such intention, should now come forward, to violate public faith, and to turn the information given for the benefit of the public against the life of him who gave it, in reliance on the compact he had entered into with the public prosecutor? Every principle of *humanity*, of *justice*, and of *policy*, is opposed to such a proceeding. There is no precedent,—there is no authority for such a proceeding. The informant acted in the belief that he had secured his protection. The public prosecutor acted in the belief that he was entitled to secure, and had secured to him, that protection, and had done so for the ultimate benefit of the public, in securing the conviction and punishment of an offender. If both parties erred in their notions of the law, they erred in common with a quorum of your Lordships' number, discharging the most important duty of the Supreme Criminal Court. If the law is now, for the first time, to be declared against that understanding and opinion, let the operation of this new declaration be confined to *future* cases,—but let not this new state of things—this alteration of a deliberate judgment of the Supreme Court, operate to the prejudice and injury of the informant, *when matters are, in respect to him, no longer entire.* To do otherwise, would be productive of no good object. The ends of *justice would not be thereby promoted.* The *public faith would be broken*, and, above all, the informant COULD NOT NOW HAVE A FAIR TRIAL. These considerations give him a sufficient claim to the interposition of your Lordships to prevent farther proceedings against him.

In respect whereof, &c.

DUN^N. M'NEILL.

INFORMATION for JANET WILSON, Senior, and JANET WILSON, Junior, Mother and Sister of the late JAMES WILSON, generally known by the name of 'Daft Jamie,'—*Respondents;*

AGAINST

WILLIAM HAIRE, or HARE, present Prisoner in the Jail of Edinburgh, and accused of the Murder of the said JAMES WILSON,—*Petitioner.*

As an introduction to the legal argument about to be submitted to your Lordships, it is unnecessary to state any thing farther in detail, than that the prosecutors have reason to believe that James Wilson, of whom they are the nearest of kin, was cruelly murdered in the month of October last, and his body sold to a surgeon for the purpose of dissection, and that the perpetrator of this murder was William Hare, now a prisoner in the tolbooth of Edinburgh. Certain facts had come to the knowledge of the prosecutors which led them to form that conclusion. It was understood that the prisoner Hare had been examined as a witness for the Crown on the trial of William Burke for the murder of a woman of the name of Docherty or Campbell, and that he had been subsequently committed on a charge for another murder said to have been perpetrated in the neighbourhood of Stockbridge. The prosecutors were, in the meantime, anxious to have the circumstances investigated relative to the disappearance and death of their relation, with a view of bringing the murderer to trial, if it should be found that the deed had been perpetrated by the individual whom they suspected, and had good reason to believe was guilty of the crime. They accordingly applied to the Sheriff (Jan. 16, 1829) for a warrant for the detention of William Hare in jail, with a view to his examination and committal, if there were just cause found against him, until liberated in due course of law. The warrant was accordingly granted, and the prisoner, upon examination, emitted a declaration, after which he was committed for farther examination. Several witnesses were precognosced before the Sheriff, and the agent for the prosecutors was proceeding in his precognition, with the view of indicting the prisoner for the alleged crime, when a petition was presented to the Sheriff, which, after reciting that the prisoner had been examined before the Sheriff of the county in relation to various acts of murder, alleged or suspected to have been committed by Wil-

liam Burke, then in custody, and other persons, proceeded in the following terms:—'That in the course of these examinations, the petitioner was assured by the public prosecutor, 'that if he made a full disclosure of all he knew relative to 'the several alleged murders, which formed the subject of inquiry, no criminal proceedings would be instituted against 'the petitioner himself in relation thereto, whatever might be 'the circumstances of suspicion, or apparent participation, or 'guiltiness appearing against him. That the petitioner was 'examined as a witness, and without the caution and warning 'which it is the duty of the judge-examinator to give to a party 'accused every time he is brought up for examination. And the 'petitioner made a full and true disclosure of all he knew, and 'gave every information he possessed in relation to all the alleged murders, as to which he was examined; and this he 'did under the assurance of personal and individual safety 'above-mentioned. That one of the alleged murders as to 'which the petitioner was so examined, was that of a person 'described as James Wilson, commonly known by the name 'of 'Daft Jamie;' and in relation to that matter, as well as 'in relation to all the others, the petitioner made a full and 'true statement, and gave every information he possessed, 'whether relative to the alleged act of murder itself, or the 'means of obtaining or tracing any circumstances of evidence 'in relation thereto; and all this he did, relying on the assurance of personal and individual safety above-mentioned, 'and the compact and transaction thence arising. That in consequence of the statement and information thus elicited from, 'and procured through the petitioner, the said William Burke 'was indicted to stand trial before the High Court of Justiciary in the month of December last, on a libel setting forth 'three charges of murder, as to all of which the petitioner 'had been precognosced as aforesaid. That one of these three 'charges was the foresaid alleged murder of James Wilson, 'alias 'Daft Jamie.' That the petitioner was included in the 'list of witnesses for the prosecution annexed to the said libel, 'and he was cited to attend as a witness for the prosecution, 'in relation to all the charges therein contained.' The petition continued to state, that the libel was found relevant to infer the pains of law, and the public prosecutor proceeded to lead evidence against William Burke, and another prisoner, 'as to one of the charges, (being the murder of Margery 'Docherty)', and that he, Hare, was sworn and examined as a witness.

These are the facts detailed in the petition, upon which the question now to be discussed is raised. The prosecutors do not

think it necessary to go more into its merits, because they are mixed up with argument. The prayer is in the following terms:—'May it therefore please your Lordship, to take in-'to consideration the circumstances above set forth; to recal 'the warrant on which the petitioner is committed, and to or-'dain him to be set at liberty; also to put a stop to the precog-'nition or examination of witnesses; and to ordain the same, 'in so far as it has already proceeded, to be delivered up to 'your Lordship's clerk, or such other person as your Lordship 'shall appoint, in order to the same being sealed and retained 'to abide the future orders of your Lordship, or other compe-'tent Judge of Court; or to give such other relief in the pre-'mises, as to your Lordship shall seem proper.' Upon this petition counsel were appointed to be heard, and the Sheriff thereafter pronounced the following judgment:—(21st January 1829.)—'The Sheriff having resumed consideration of the pe-'tition for William Hare, and having heard the counsel 'for William Hare, and the respondents, Janet Wilson, se-'nior and junior; In respect that there is no decision, finding 'that the right of the private party to prosecute, is barred by 'any guarantee or promise of indemnity given by the public 'prosecutor, refuses the desire of the petition; but in respect 'of the novelty of the case, supersedes farther proceedings in 'the precognition before the Sheriff, at the instance of the re-'spondents, till Friday night at seven o'clock, in order that 'William Hare may have an opportunity of applying to the 'Court of Justiciary.'

This judgment was brought before this High Court by bill of advocation; and the prisoner, at the same time, applied for suspension and liberation, in common form.

The grounds of his application to your Lordships are the same stated in the prisoner's petition to the Sheriff.

He, in the *first* place, founds upon his examination before the public prosecutor, and the pretended agreement upon which he disclosed those facts which he states to have been in his precognition, relative to the various murders with which Burke was charged; and,

2dly, He founds upon his examination as a witness upon the trial of William Burke, for the murder of Margery Docherty, or Campbell, as affording him an indemnity not only against prosecution for another and a different murder, but as vesting in him such a personal right to indemnity, as to entitle him not only to an immediate liberation from jail, but to have the authority of your Lordships interponed, to prevent any precognition as to his alleged guilt.

The pleas thus maintained on the part of the prisoner

lead to the discussion of grave and important questions of law.

The prosecutors are, in the *first* place, obliged to support their title in the present prosecution, and to shew the constitutional right which, according to the law of Scotland, they possess, of bringing the individual to justice, whom they conceive guilty of the atrocious crime by which they have been injured.

But, *2dly*, the prosecutors are anxious to contest the doctrine of indemnity upon which the prisoner has founded, and to shew that he is stretching far beyond its legal limits, the indulgence granted by the Court of Justiciary to those who are examined before it as *socii criminis*.

I. The right of the private party to prosecute is not controllable by the public prosecutor, and is independent of him.

The prosecutor states this as a fundamental and constitutional principle of the criminal jurisprudence of Scotland. It is not an antiquated right, as stated by the counsel for the prisoner, but is recognised by the latest authorities, and is consistent with the most fundamental principles of our practice. It would be detaining your Lordships by a useless and unprofitable parade of authority, to show, that in no very late periods of our law, the right of prosecution was considered as inherent in the private party; and that, even when the more scientific, and the wiser, and the more legal plan of a public prosecutor was devised, his proceedings were not prejudicial to, but correctory of the proceedings of the private party. Mackenzie observes, in referring to the act 1587, cap. 77, and a prior enactment, 1436, that pursuits at his Majesty's instance are only *subsidiary*, and that from these acts 'two things may be concluded, 1*st*, 'That of old it was doubtful if the King could pursue private 'crimes without an accuser;—*2dly*, That pursuits at his Majesty's instance for private crimes are yet only subsidiary, 'and allowable if parties be silent or collude,' &c.—(Burnet, p. 296.)

Mr Burnet states the original practice, and the manner in which it now subsists, in the clearest terms; and it is quite sufficient for the prosecutors to quote them, in order to establish the proposition upon which the first part of their argument is founded:—'In many cases, indeed, long after the institution of King's Advocate, we find it objected that he could 'not prosecute without the concurrence of the party injured, 'or his kinsmen. This, at all events, is clear, that the proper

'and original form of prosecution with us, was in the name of 'the private party injured, who accordingly prosecuted not 'merely for reparation and redress to himself as an individual, 'but for punishment and for reparation to the public; and 'hence it was that this form of prosecution continued, and '*still subsists with the same effect, and to the same conclusions* as 'to the full pains of law, as a prosecution at the instance sole-'ly of his Majesty's Advocate.'—(Burnet, p. 297.)

Baron Hume states the right of the private party as at present existing, to be as strong in every respect as that of the public prosecutor; and his opinion on such a question must have been founded upon the most decided authority.—'First 'of all, it is to be noted, that the title of the private party em-'braces, in every instance, the full pains of law, not only the 'private interest of damages, *solatium*, and expenses, but the 'same high and personal conclusions of corporal or other chas-'tisement, wherein the Lord Advocate, for the interest of His 'Majesty, might insist. Thus, in case of homicide, a libel at 'the instance of the wife, or the kinsmen of the deceased, is 'as good towards inflicting the highest vengeance of the law 'on the body of the culprit, if he is found to be a murderer, 'as it is in a case of culpable homicide for recovery of the as-'sythment or pecuniary consideration which is then due to the 'kindred.'—(Hume, Vol. II., c. 5, p. 115.)

It is therefore a matter of law, as fixed by these authorities, that while the right of the private prosecutor was originally considered as paramount to that of the public, it even now subsists as equal to it, so far as the right to prosecute and the penalties of the law are concerned.

There can, therefore, be no question in this High Court, as to the title of the prosecutors. They state themselves to be, and in a question of relevancy, their statement must be received as correct, 'the nearest kinsmen of the deceased demanding 'the vengeance of the law on the body of the culprit, if he is 'found to be a murderer.'—(Hume.) Their right therefore to prosecute, being as fully recognised as that of the public prosecutor, and held to be commensurate with the crimes of which they have reason to accuse the prisoner, it is for him to establish that the constitutional right thus shown to exist, can be interfered with or taken away without the remission of the Crown, or the acquittal of the jury.

The prosecutors may here observe, that, legally speaking, there are only two situations in which a prisoner can actually plead indemnity in bar of trial. They are:—Previous Acquittal, by a jury, of the crime of which he is charged; or Remission by the Crown. These are the two constitutional modes

of freeing an accused party from the consequences of alleged crime. The first clears the individual of the accusation made against him by the verdict of his peers, and the second frees him of the legal taint, as well as of the punishment which conviction would otherwise attach.

Either of them is an effectual bar to trial, whether at the instance of the public prosecutor or of the private party. The latter may indeed have his action of damages for the injury he may have sustained, because the right of the Crown to pardon, cannot interfere with patrimonial interest; but, in so far as the pains of law are concerned, these are effectually remitted.

The point which the prosecutors are anxious to establish, and which they feel confident, is the sound and constitutional law upon the subject, is this, that whatever may be the nature of the private arrangement between the public prosecutor and the criminal, and whatever may have been his inducement to give up the right of calling upon the criminal to answer at the bar of justice, for the crime of which he is guilty, that arrangement cannot deprive the private party of his right to insist for the full pains of law. If the law contemplated the power of the public prosecutor to deprive the private party of his right to prosecute by arrangements to which the latter is no party, it had better declare at once, that the private instance shall be at an end, because it virtually would be so. In every case where the public prosecutor wished to protect a criminal, and shield him from the effects of crime, an arrangement, under the pretence of a precognition and searching for evidence against a third party, might at once be made; and, if the doctrine maintained on the part of the prisoner be correct, that would prevent all prosecution at the instance of the individual injured.

This is a question of law, and not of motives. It is no answer to say, that in the present age, the high officer who discharges the duty of public prosecutor, is not likely to be tainted by partiality or corruption. Bad men live in all ages; and though the danger may now be less than in former periods, yet the history of this country has shewn too many instances of corruption even in the highest offices, for us to assume as an indisputable proposition, that no one likely to prostitute his high office, will ever be placed in it. The prosecutor says, this cannot be assumed; and it would be much better to invest the Lord Advocate with the power of entering a *nolo prosequi*, and thus put an end to the right of private prosecution, than take away that constitutional right under the semblance of a legal principle, which, if supported, infallibly goes the

length of putting into the hands of the Lord Advocate, the power of controlling, and of effectually putting an end to, every attempt at bringing an alleged criminal to justice, at the instance of those who hitherto have been considered by the law as having a right and title so to do, except in those cases of indemnity which have been already pointed out.

The assertion of the prosecutors is, that their legal right to investigate the circumstances attending the death of their near relation, and to indict the accused party if they shall find sufficient ground to do so, cannot be interfered with by the proceedings of the public prosecutor, in circumstances over which they have no control. They say, that this doctrine must be held, because it flows as a necessary and irrefragible consequence from the constitutional right of prosecution, which has been proved to exist. If the right be in the private party, how can it be wrested from them, by the communications which pass between the criminal and a third party, over whom they have no control, but to whom, on the other hand, the law gives no power of depriving them of that right of demanding justice and vengeance which it has vested in them?

The propriety of maintaining that safeguard of the rights, and the prosecutors may add, the liberties of the people, which our ancestors wisely committed to those who might have a more peculiar and immediate interest in vindicating injured law, and bringing the criminal to punishment, is well pointed out by Mr Burnet. But, before quoting his words, the prosecutors will only further observe, that although the right of popular accusation may not be altogether defensible, yet that is a wise and a wholesome provision, which, restricting the right to that of the party injured, affords some check to the power of a public prosecutor, and prevents him from being able to stifle all inquiry, where private reasons might influence his conduct.

After stating that a public accuser in crimes was introduced for the purpose of preventing offences from going unpunished, Mr Burnet continues:—'This seems the principle on which 'private as well as public prosecutions are founded; and 'while one operates as check upon the other, to prevent on 'the one hand, the feelings of humanity, and a wish to *compound* the crime, which may sometimes actuate the individual, 'and on the other, the partiality and undue bias which may 'sometimes actuate the public accuser from interfering with 'the interest of public justice, both conspired to the same end, 'the *securing the punishment of offenders*. It is, indeed, the 'union of these two modes of prosecution, that constitutes the

'pre-eminence of the criminal jurisprudence of Scotland, and 'distinguishes it from that of most other countries of Europe. 'It is by preserving both in due vigour, that public justice is 'effectually secured; that the remissness or partiality of the 'public accuser is on the one hand guarded against, and the 'too great lenity and forbearance of the individual corrected 'on the other. Hence it is, that with us no prosecution can 'in any instance be stiffled, and the feelings of the individual 'or kinsman outraged, by a denial of justice; while, in other 'countries, the *nolumus prosequi* of the public accuser, stops in 'many cases any process at the instance of the party injured, 'and his rarely interfering to prosecute in his own name, 'occasions in many instances a remissness in the execution 'of the law.'—(Burnet, p. 298.)

The learned author here distinctly lays down, not only that the right of the private party has not been taken away by the power vested in the hands of the public prosecutor; but that it exists to its fullest extent, and operates as a legal, and constitutional, and effectual check, against any exercise of his powers, to prevent the prosecution of crime, whether that may arise from partiality to the accused, or any other less definable motive. But it may be necessary to observe how this private right has been exercised.

In point of form, it is required that the Lord Advocate should grant his concourse to a prosecution before the High Court of Justiciary. This form, however, is established, not for the purpose of showing that his permission to prosecute is necessary, but for the purpose of showing that there is a public injury to be vindicated, as well as a private party to be satisfied. Accordingly, the Lord Advocate has no right to refuse his concourse. If he should refuse, he can be *compelled* to grant it, for this very reason, that it is not in *arbitrio* of him to deprive the private party of his legal right. The law was so stated by Lord Alemore, on the complaint of Sir John Gordon against his Majesty's Advocate, June the 21st, 1766. Sir J. Gordon had complained against the Lord Advocate, for refusing to prosecute at *his instance*. The Court found that he was not bound to do so; and Lord Alemore observed, 'had the Advocate refused his concourse, he might have been '*compelled* to give it, for every one is entitled to justice, but 'he cannot be forced to prosecute.'

The same doctrine is laid down by our authorities. Mr Burnet observes,—'It is understood that his Majesty's Advo-'cate cannot refuse his concourse, and may be compelled to 'give it, in all cases where the complaint of the private party

'is founded on a known and relevant *point of dittay*, and as to 'which he has, *prima facie*, a *title* to insist. On the other 'hand, such concourse his Majesty's Advocate may refuse in 'cases that are clearly of an opposite description,—a power 'which seems to result from the nature of his office, and from 'what seems to have been in part the principle on which such 'concourse was originally deemed necessary.'—(Burnet, p. 306.) Baron Hume states the law to the same effect. After mentioning the cases in which the Lord Advocate might refuse his concourse, where the charge is palpably absurd and incompetent, he continues:—'On the other side, certainly, the Lord 'Advocate is not the absolute and unaccountable judge on 'such occasions, but is subject to the control and direction 'of the Court, who will oblige him to produce and to justify 'the grounds of his refusal to concur. Nay, more, except in 'such extraordinary situations as those above supposed, which 'cannot be the subject of any difference of opinion, *he shall 'not even be allowed to engage in any inquiry concerning the 'merits of the case*,—the propriety of the prosecution,—the 'form of the action,—the sufficiency of the title, or the like, 'but shall be ordained to comply straightway, leaving the 'discussion of those matters for the proper place and season, 'after the libel shall be in Court.'—(Hume, Vol. II. p. 123.)

It is only, then, where a prosecution is *absurd*, or palpably *incompetent*, that the Lord Advocate can refuse his concourse. He is not to be a judge, says Baron Hume, 'as to the propriety 'of the prosecution, the form of the action, or the sufficiency 'of the title.' These are subjects to be discussed and decided by the proper tribunal, when the case comes into Court. If these authorities are to be held as stating what is the law, then the informants assume this as an incontrovertible proposition, that the mere precognition of the accused, however that may tie up his own hands as public prosecutor, could not be sustained as a sufficient reason for the Lord Advocate's refusing to give his concourse to the private party who thought fit to prosecute.

There is one decision of the Court which carries the right of the private party still farther. In the noted case of Colonel Charteris, who was tried for a rape at the instance of the woman's husband, the Lord Advocate's concourse was formally withdrawn, at the calling of the libel. The want of the concourse was then pleaded in bar of trial; but, after a full argument, the trial went on at the instance of the private complainer, as for the full pains of law.—(Hume, Vol. II, p. 124.)

These authorities, and the rules of law upon which they are founded, sufficiently establish the proposition with which

the informants set out. They establish, that the right of the private party is perfectly independent of that of the Lord Advocate; and that it cannot be interfered with by any arrangement into which that high public officer may think it necessary to enter, or any circumstances in which he may find himself placed.

If the Lord Advocate has entered into any compact of the nature alleged with the prisoner, that may be a sufficient reason for his Lordship applying to the proper quarter for pardon, and for remission of the crime with which he is accused. With that neither the private party, nor the Court, has any thing to do; nor can it come into discussion in the present case, or have the slightest effect upon the legal argument.

It is now necessary to request the attention of your Lordships more particularly to the grounds upon which the prisoner has applied for liberation. He sets forth,—1*st*, That he is entitled to release and indemnity, in consequence of having been examined by the public prosecutor, upon a promise of safety; and, 2*d*, From having been examined as a witness upon the trial of William Burke, for the murder of Mary Campbell, or Docherty.

Now, as to the first ground of application, the informants conceive that they have already stated what must be sufficient to prove, that if the Lord Advocate can be compelled to give his concourse to the prosecution, then, *a fortiori*, no private arrangement he can enter into with the party accused, can interfere with their right to prosecute. It is humbly thought, that as to this part of the case, there can be no difficulty. Suppose that the prisoner were at this moment incarcerated at the instance of the Lord Advocate, would your Lordships hold it to be a good ground of interference, and liberating the prisoner from all inquiry and prosecution at his instance, that he had been examined and precognosced in manner stated in the bill of suspension? But if your Lordships would not control the right of the Lord Advocate, or interfere with him, *ab ante*, in the exercise of the functions of his office, much less can these proceedings interfere with the right of a third party recognised by law, in the manner that the right of private prosecution is.

But the prosecutors may leave this part of the case, because, if the prisoner is not *indemnis* by his examination in Court, *multo magis*, he is not so by a private examination.

The point now to be argued, is as to the effect to be given by the Court, to the fact of the prisoner having been examined as a witness in Court upon the trial of Burke. The prosecutors here state their second proposition.

II. The *socius criminis* is only protected by the indulgence of the Court, with regard to the particular crime as to which he gives evidence.

It is well known, and therefore it is unnecessary to quote authority upon the subject, that formerly a *socius criminis* was not received as an evidence in the criminal courts of this country, because of the interest which he was supposed to have in establishing the guilt of the individual accused, and thus freeing himself from imputation of the crime. Of course, it followed, that at this time the witness was liable to prosecution for the offence, although he gave evidence upon the trial of another accused of it. The practice which has lately crept in, of affording an indemnity to the witness, and protecting him by the interposition of judicial authority from all question, for the crime as to which he has given evidence, does not appear to have been recognised, until subsequent to the case of Jameson, in 1770.

But, before quoting the circumstances of that case, it may be observed, that perhaps it might have been better, both constitutionally and legally, if the indemnity had not been acquired; and, if every case had been left to be considered according to its peculiar circumstances, by the prosecutor and the Court, as affording ground for an application for pardon, to that constitutional source, in which the power of pardon is vested. It is possible to conceive many cases, in which, according to the present rule of practice, much difficulty might arise. All these are guarded against by the wise and salutary rule of the law of England:—'By the practice most 'usually adopted, accomplices are admitted to give evidence 'for the Crown, under an implied promise of pardon, on con'dition of their making a full and fair confession of the truth. 'On a strict and ample performance of the condition, to the 'satisfaction of the Judge presiding at the trial, (although 'they are not of right entitled to pardon), they have an 'equitable title to a recommendation for the King's mercy.'—(Russel on Crimes, Vol. II. p. 598.)

But without recurring to this point, farther than to say, that it gives reason to doubt whether it would be consistent with constitutional principle to carry the right of indemnity farther than it has hitherto been supported by authority or practice, the informants would request the attention of your Lordships to this fact, that, in the year 1770, no such right, on the part of the witness, was established. The case of Jameson, which then took place, is thus reported by Mr Burnet:—It will be observed, that the report of the case is contained in

a note upon the text of that learned author's work, in which he states it to be '*now* held, that the very act of calling and 'examining an accomplice as a witness on the part of the 'Crown, goes far to operate as a discharge or acquittal to 'him from all prosecution for that crime,'—(page 417);—a passage in which, it will be observed, the doctrine is not directly laid down, that the witness is discharged of the crime, but merely that his examination may *go far* to operate as an acquittal from the crime as to which he is examined. The note is in these words:—'In the case, accordingly, 'of Macdonald and Jameson, in August 1770, when the objection of a witness having been *socius criminis* was fully debated, the prosecutor, in answer, did not say that the witness, by being examined, would thereby be exempted from 'prosecution, but only that he might hope for impunity; 'while the usage, at that time, of granting special pardons to 'accomplices, for enabling them to give evidence, confirms 'what has been stated. At what period a different rule came 'to prevail does not appear.'—(Page 418.)

Baron Hume conceives, that the practice may have commenced from the rule introduced by 21st Geo. II. c. 25, as to a particular offence. It was declared by that statute, that in all trials in Scotland for theft of cattle, it should not be a good objection to any of the prosecutor's witnesses that he was *socius criminis*, and that such witness should not be liable to prosecution on account of his accession to such offence.—(Hume, Vol. II. p. 354.)

Here was a law passed as to a particular offence, and indemnity given to the witness with regard to that offence. If the ordinary maxim, *exceptio firmat regulam*, had been attended to, the predecessors of your Lordships might have hesitated, before they extended the rule applied by statute to the particular case specified. But the *exception* seems to have been taken as the *rule;* and accordingly, in the discussion which took place in the case of Smith and Brodie, in 1788, where it was stated as an objection to a witness, that he had received a promise of pardon if he would give evidence against the prisoners at the Bar, for a crime of which he was alleged to have been a *socius*, the Court ruled that the objection was not maintainable, because the very act of calling him in Court relieved him of the penalties which the law would otherwise attach to the offence of which he was guilty.

It will be observed, however, that the witness was to be *called* in Court, and that the indemnity merely extended to the case as to which he was examined.

The doctrine maintained on the part of the prisoner is, that

he is relieved, not only from the consequences attaching to his participation in the crime as to which he has been examined, but also as to others, in regard to which the same parties may have been implicated, but which have not been the subject of trial. This argument extends the doctrine of indemnity much farther than it has yet been carried.

For the question underwent grave discussion; and the practice, as then followed by public prosecutors, and recognized by the Bench, is distinctly stated by the learned Judges in the case of Downie, who was tried for high treason in the year 1794. The discussion arose upon certain questions being put to a witness of the name of Aitcheson, tending to criminate him. The danger had been pointed out by the counsel for the prisoner, to which the course of the examination might lead, as the witness might confess that which was sufficient to convict him of the crime of treason.

The Lord President of the Court stated his own practice in criminal cases, and that, when he was Lord Advocate, he understood that he could not, after making use of a *socius criminis* as a witness, bring him to trial for the *same* crime: But he requested to be informed as to the law of England; and then proceeded to say, that if he was assured 'that the witness runs no risk of being prosecuted himself, being virtually or expressly liberated from the charge, so far as he himself may be concerned, in consequence of his being called as a witness, and *speaking out the truth in this trial*, it will be my duty to tell him, that he is bound to speak out the whole truth, and that he is in safety to do so.'—(STATE TRIALS, Vol. XXIV. p. 32.)

The observations of the Lord Chief Baron are of material consequence, because he states the practice:—'I served a good many years as prosecutor in this country, and I always understood, when I brought a *socius criminis* as a witness, that my hands were tied up from the prosecution of him for any thing spoken at the Bar. But if he would not speak out, I thought myself at liberty to prosecute him for any thing he did not speak out: A person being brought to the Bar, and not speaking, should that protect him from trial for any offence, when he is only protected for what he shall speak upon the trial?'

Lord President.—'I am of the same opinion. If he refuses to speak, he is not a witness,—he may be put back to his former situation.'

Lord Advocate.—'What the honourable Judge has stated is perfectly right, and the law.'

Lord Eskgrove.—'I never knew an attempt made by the

'prosecutor, to bring afterwards to trial for the same crime, 'any person who had been examined as a witness upon that 'crime to which he had been accessary, and who had not re-'fused to give evidence, but had given evidence. I had con-'ceived a notion in my own mind, that if such an attempt 'should be made, the Judges who are to determine upon the 'law of the land, as it strikes them, would not suffer a person 'so circumstanced to be subjected to a trial, and consequently 'that it is not optional in the public prosecutor to bring him 'to trial or not, for that the Court would interfere and pre-'vent such trial proceeding, although that case has not yet oc-'curred. I therefore think there is no place for the objection 'in his, (Aitcheson's), case; and, with respect to any other 'witnesses, I am of the same opinion with your Lordships; it 'is not competent for the prisoner's counsel to object, although 'the witness himself may decline to answer to questions tend-'ing to criminate himself; but if he chooses to answer and 'give evidence, I conceive he will be secure against any future 'prosecution.'

Lord Swinton, and the other Judges who were present, concurred in the opinions then expressed.

The doctrine laid down by the whole of these learned Judges, is this, that for what the individual told in Court as a witness, he could not afterwards be questioned; but, so far from their glancing at the idea of an indemnity afforded by previous precognition, they distinctly state, that if the witness, after being put in the box, refuses to answer, he would not have been entitled to any protection; and that they, as public prosecutors, would not have considered their hands tied up.

It will be observed, that all this specially refers to the peculiar case as to which the witness is examined. There is not the least shadow of authority that the doctrine, as laid down by these Learned Judges, would have been applicable to a charge as to which the witness was not examined. On the contrary, the informants may use the language of Lord Chief Baron, and say, that as to such charges, the hands of the public prosecutor would not have been tied up.

The case of Dreghorn, in 1807, (Burnet, App. No. 21.) is next to be referred to. The question here was as to indemnity from trial before a court-martial, of an individual who was examined before the High Court of Justiciary. An objection was taken to a witness adduced, that he was a party in the affray which had given rise to the trial, and that the Court could not protect him from the consequences of his evidence. The Lord Justice-Clerk, (Hope), in stating his opinion, which was against the objection, observed, that as the prosecution 'had

'been brought by the officers of the Crown, every thing must 'so far yield to the consequences which followed by law from 'such provocation; and one of them is, that a witness examin-'ed in the circumstances here occurring, must be ever after-'wards freed from any prosecution *for the matter as to which* '*he gives evidence.*'

After some hesitation, the other Judges agreed in the opinion expressed by his Lordship, and repelled the objection, upon the ground that the '*examination* of the witness afforded him an 'indemnity as to any after trial.' As the question arose upon the competency of examining the witness, and requiring him to give evidence on a trial in open Court, and long after all proceedings in the way of precognition had been concluded, it is manifest, that the *examination* here spoken of could not possibly mean the private examination to which the witness might have been previously subjected by the prosecutor.

There is here no extension of the rule of practice. The witness is not held to be *indemnis*, except after examination in open Court; and it necessarily follows, that the indemnity can only extend as far as the crime in regard to which he has been examined.

These are all the authorities which the informants can find upon the subject, with the exception of a single *dictum* of the Lord President, when presiding upon the special commission at Dumbarton, in the year 1820. On that occasion, a question was put to a witness, which the counsel for the prisoner thought might criminate him, and he requested the Court to caution him as to the answer to be given. Upon that occasion, it was observed by the Lord President, 'there is one thing you need 'not distress yourself about. A witness brought here cannot 'be prosecuted *for what he has said.* That is part of the law 'of Scotland.'—(Trials for High Treason, Vol. II., p. 506.)

It will be observed, that the docrine in all these cases is carefully guarded in its application to what is said in Court, or to the peculiar crime, with regard to which the trial has been proceeded.

The informants, therefore, state, as a substantive proposition, that the Court has not hitherto acquired the power of interposing between an alleged criminal and the course of justice, in those cases where he has not given evidence before it, as to the peculiar crime charged. There is no authority for carrying that interposition farther; and, without recurring to the question of expediency, it may be observed, that it is difficult to reconcile the claim of indemnity as matter of right, with the fact, that an indulgence of the Court, not recognized by statute, or founded upon any precise law, must be extended

far beyond its ordinary limits, before the plea can be sustained.

But the informants having stated the general principle, must now approach the *res gestæ* of the present case. They must be fresh in the recollections of your Lordships, and afford a distinction of the utmost importance. The indictment against Burke charged *three* different acts of murder, to establish which, the names of certain witnesses, of whom the suspender was one, were thereto appended. At the trial an objection was taken to the relevancy of the indictment, upon the ground of the pannel not being obliged to answer to three separate charges at once; and the Court are aware that the Lord Advocate, after debate, declared that he would go to trial only upon one charge; and the Court therefore remitted the pannels, with that charge as found relevant, to the knowledge of an assize,—reserving to the public prosecutor afterwards to proceed against Burke on the other two charges therein contained.

The interlocutor pronounced by the Court was in the following terms:—'The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the indictment against William Burke and Helen M'Dougal, pannels, and having heard parties' procurators at great length upon the relevancy thereof, find the indictment relevant to infer the pains of law; but are of opinion, that in the circumstances of this case, and in consequence of the motion of the pannel's counsel, the charges ought to be separately proceeded in; and that the Lord Advocate is entitled to select which charge shall be first brought to trial; and his Majesty's Advocate having thereupon stated that he means to proceed at present with the third charge in the indictment against both pannels,—therefore remit the pannels with that charge, as found relevant, to the knowledge of an assize, and allow the pannels, and each of them, a proof in exculpation and alleviation, reserving to the public prosecutor afterwards to proceed under this indictment against the said William Burke, upon the other two charges contained therein.'

Burke, the pannel, and his wife, were therefore put upon trial as to this *one* charge, which your Lordships are aware had no connection with the individual as to whose death the informants are anxious to investigate. It is therefore certain, that the counsel for the Crown could not have proceeded to put one single question, as to the other charges which might have been contained in the indictment. They were to all parties as if never made. The Crown could not examine, nor the Jury convict, as to one of them. However, generally, the witnesses cited in support of the indictment might have been examined

previous to the restriction of the charge, they were after that merely witnesses as to the crime of murdering Margery Campbell, or Docherty; and it is not known to the Court, nor to any one, whether they could have stated a single circumstance as to any other of the alleged murders previously contained in the indictment. Accordingly, it will be observed, not only that the witness was specially warned by the Judge who swore him, and the presiding Judge, that he was only to answer questions relative to the charge which had gone to trial; but when the counsel for the prisoner did, on the cross-examination, put questions leading to a detail of the other murders charged, the prisoner was told that he need not answer, because he was not protected with regard to these crimes.

After administering the oath to the prisoner, who was brought forward as a witness upon the trial alluded to, Lord Meadowbank stated to him,—'Now, we observe that you are 'at present a prisoner in the Tolbooth of Edinburgh, and from 'what we know, the Court understands that you must have 'had some concern *in the transaction now under investigation.* 'It is therefore my duty to inform you, that whatever share 'you might have had in *that* transaction, if you now speak 'the truth, you can never afterwards be questioned in a court 'of law.'—Lord Justice-Clerk:—'You will understand that 'you are called here as a witness regarding the death of an 'elderly woman of the name of Campbell, or M'Gonegal. 'You understand, that it is only *with regard to her* that you 'are now to speak?' To this question the witness replied, by asking,—'T'ould woman, Sir?'—Lord Justice-Clerk,—'Yes.' It cannot be denied, that the witness was informed by these learned Judges, that he could only be questioned as to the particular charge then under trial, regarding the death of Docherty. But what is, perhaps, of still greater importance, it will appear that he was not permitted to answer questions which might otherwise have been of importance to the individual then upon trial, upon the ground that he would not be protected.

The question arose upon an objection taken by the Lord Advocate, to a question put by the counsel for the prisoner, upon the ground that he was not bound to speak to any of the cases, excepting the one under investigation; and, before the discussion, Lord *Meadowbank* observed,—'I have to state this, that 'the witness is brought here to be examined on the matter be'fore the Court; and he cannot, in any circumstance that 'may be disclosed in that evidence, be examined on a cross-'examination,—he cannot be called on to answer other mat'ters, because the Court cannot protect him.'

After the competency of the question, the same learned Judge observed:—' Even our law goes no farther than to protect ' witnesses from being subject to prosecution, on account of ' matter immediately and inevitably connected with the sub- ' ject of the trial, in the course of which they are examined. ' I understand it, therefore, to be admitted, that if the ques- ' tion proposed were entertained by your Lordship, the wit- ' ness must be told that he is not bound to answer it: because ' it is beyond the competency of this Court to afford him pro- ' tection against being afterwards questioned for the perpetra- ' tion of crimes, which did not form the proper subject of in- ' quiry in the present investigation.'

His Lordship afterwards continues,—' We may be involved ' in an inquiry into the circumstances connected with the ' other murders in this indictment, which are *not now the sub-* ' *ject of this trial*, and which your Lordships, by your inter- ' locutor, have precluded from being the subject of trial at ' present, and before this Jury.'—(Trial, p. 102.)

Lord Machenzie.—' I agree, in the first place, that the wit- ' ness has no protection beyond the case in which he has been ' called as a witness. I have no idea that, by confessing either ' ultroneously, or on his examination, or cross-examination, ' other crimes than those, in reference to which he has been ' brought forward to give evidence by the public prosecutor, ' he could acquire any right to impunity for those crimes, or ' even security that his own words might not be used in evi- ' dence for his conviction of those crimes.'

Lord Justice-Clerk, after stating that it was necessary to warn the prisoner, that he need not answer any question which might criminate himself, and the witness might avail himself of this warning, continues,—' If this witness does so avail ' himself, it cannot affect his credibility,—when we told him ' in the outset to-day, that it was only to this case he was to ' speak, and to no other,—and that nothing he said in this ' particular case could have any effect against him.'

His Lordship afterwards observes:—In the first place, my ' view of this matter is, that he *is not bound to answer any* ' *question except as to the murder of this woman.*'

The counsel for the pannel afterwards put a question to the witness, as to a murder committed in his house in October last, one of the murders contained in the indictment as charged against Burke, and the identical murder of which the witness is now accused. Taking advantage of the warning which he had received from the Court, and proceeding upon the principle that he could not be protected, with regard to that particular murder, the prisoner *refused* to answer.

To continue the narrative: Upon the wife of the prisoner, Hare, being placed in the witness box, she was addressed by Lord *Meadowbank*, who observed,—'We understand that you 'are implicated in a charge of the crime of murder, for the 'murdering of an old woman of the name of Docherty. It is 'my duty to tell you, that for any thing *connected with that* '*murder, you can never be brought to trial*, if you speak the 'truth. You are bound to speak nothing but that to which 'you are sworn to speak, *not to the other murders.*'

It is understood that this is a correct account of the proceedings upon this trial, and they establish these indisputable facts:—

1*st*, That the witness was examined as to no other murder than that of Docherty or Campbell. And,

2*dly*, That he was distinctly warned that he was not bound to answer any question, with regard to the other murders contained in the indictment,—because, as to any other murder except that under investigation, he was not protected by the Court.

This is a question of fact. It does not admit of argument; and unless the prisoner is ready to contest the statement in point of fact, now made, it must be conceded, that except in regard to the peculiar case stated, no investigation took place, and no question was asked.

But the circumstances attending this part of the trial are direct authority in favour of the argument now maintained by the informants. The Court thought it necessary to warn the witness, that he need not answer any question, except one applicable to the particular case of murder then under investigation, because it could not protect him. But the investigation was limited to the case of Docherty,—that was the case tried. The question asked as to the murder of Wilson was *not* answered,—the prisoner availing himself of his right to refuse to answer; and if there is any truth in a syllogism, it follows, that as the case of Wilson was not then tried, the prisoner cannot now demand the protection of the Court for any thing that took place upon that trial.

The present question therefore stands thus: Hitherto a witness has only been protected from trial for the particular crime as to which he has given evidence. The prisoner has given none as to the crime of which he is now accused, and, therefore, he has not been placed in that situation which entitles him to the protection of the Court.

But it is right to try the doctrine advanced on the part of the prisoner, by adverting to the different situations in which, if good, it may be pleaded. If a *socius criminis* is called as a

witness, but the diet is deserted against the pannel, and he is dismissed from the bar without trial, are your Lordships prepared to hold, that the mere placing his name in the list of witnesses is a sufficient claim to indemnity, and might be pleaded in bar of trial against the Lord Advocate?

Or, suppose that, in the present case, the pannel Burke had been served with three separate indictments upon the three charges of murder made against him, and that the name of the prisoner had been included in the list of witnesses upon the first, but not on the other two indictments; would your Lordships have been prepared to hold, that all investigation, either at the instance of the Lord Advocate, or of the private party, was so illegal, as to require your instant interference, by a sentence of suspension and liberation, if commenced as to those crimes charged contained in the last indictments?

But the prisoner says that he was ready to give evidence as to the murder of Wilson, and therefore kept his compact with the public prosecutor.—*Quomodo constat* that this is true?—*Quomodo constat* that he would have said one word as to that matter, or might not have placed himself in the same situation in which Lord Chief Baron Montgomery states a witness might be placed, of refusing to answer, and, therefore, being liable to prosecution?

In short, the doctrine that has been established by practice seems to be this, that for what he has said on examination, the Court may protect the witness, by granting him indemnity; but that they are not presumed or understood to know, or listen to any thing, which has not taken place before them in Court, and during trial. The high office of the Judge entitles him to protect a witness brought before him, with regard to the facts to which he speaks, and the purposes of justice may require that this power should be granted; but the Judge knows nothing of what takes place out of Court; he knows nothing of any precognition before evidence is given, or any compact that may exist between the public prosecutor and the witness; and as the exemption has been hitherto limited to the peculiar crime under investigation, it may be matter of deep consideration, whether a power of pardon, not granted by statute, nor arising *ipso jure*, should be stretched beyond those limits to which it has hitherto been confined.

It is another and a different question, whether circumstances in a peculiar case may not entitle a criminal, however atrocious, to a pardon? But the prerogative of pardon is constitutionally vested in the Crown; and it may, at least, be questioned, whether the public interest is not best maintained, by

allowing that right to remain in the quarter, where the law and the spirit of the constitution has placed it.

Without detaining your Lordships farther, the informants submit, that the present bill of suspension should be refused.

In respect whereof, &c.

E. DOUGLAS SANDFORD.

EDINBURGH, 2d FEBRUARY 1829.

The Court met for advising the papers in this very important case:—

PRESENT,

The LORD JUSTICE-CLERK, (BOYLE.)

Lords GILLIES.
PITMILLY.
MEADOWBANK.

Lords MACKENZIE.
ALLOWAY.

Counsel for Hare.

Mr DUNCAN M'NEILL.
HUGH BRUCE.

Counsel for the Private Prosecutors.

Mr FRANCIS JEFFREY.
THOS. HAMILTON MILLER.
E. DOUGLAS SANDFORD.

Counsel for the Crown.

LORD ADVOCATE, (RAE.)
Mr SOLICITOR-GENERAL, (HOPE.)

Mr ROBERT DUNDAS,
ARCHIBALD ALISON,
ALEXANDER WOOD, } *Advocates-Depute.*

Lord Justice-Clerk.—My Lords, you will now proceed to give your opinions upon this case; and I may state, that we owe thanks to the learned gentlemen for the able pleadings, both oral and written, and for the dispatch with which these Informations have been prepared.

Mr Jeffrey rose, and spoke as follows:—It is not my intention, my Lords, to resume the argument which was formerly urged on this side of the Bar, and which has been so fully stated in the printed information now in the hands of the Court; but I trust your Lordships will indulge me with a few words—[Lord Justice-Clerk—Certainly]—especially as the case has been brought to a definite point, by the precise and unequivocal statement in the case for the suspender, and the detail of facts contained in the answers of the Lord Advocate. The whole argument, when resolved into its principles, comes exactly to this, that the public prosecutor is entitled, on behalf of the Crown, to enter into a compact with accomplices whom he may think proper to adduce as witnesses, or with whom he may have held previous communications, and that to this compact your Lordships are bound to give effect. Is it meant to be maintained, however, that your Lordships have no power over such a compact? Have the Court no judicial discretion over the terms of such an agreement, and does it rest with the Lord Advocate, and not with the Court, to decide on its validity and effect? In this case, it seems to be taken for granted, that the Court must interpose its authority to any paction which the public prosecutor may think fit to make;—and yet, the claim to immunity is rested on the act of the Court, in admitting the witness. This does not seem very consistent; and yet, if the Court is to exercise *any* controul, it may, in every case, refuse to sanction the previous compact, and judge for itself of every claim to immunity that is made in its presence. No pretension, however, of this kind, has ever been asserted; and, therefore, the argument just comes to this, that the Lord Advocate is *per vias aut modos* substantially invested with the Royal Prerogative of pardon. Take the case of a murder committed, of which a number of persons are accused, one of whom is also accused of various other crimes, as rape, fire-raising, and housebreaking,—and suppose the Lord Advocate, in the exercise of a sound judicial discretion, and in order to let in light upon these atrocities, guarantees to that individual an immunity from the consequences of all the crimes in which he has been engaged,—is it meant to be maintained that a sufferer by fire-raising, for example, is to be precluded, years afterwards, from obtaining redress, by reason of a compact entered into in regard to other offences? In the exercise of a sound discretion, of which no one but himself is to judge, the Lord Advocate may promise a plenary indulgence for any crime, committed or to be committed; but have the Court, I ask, no controlling power over such a discretionary exercise of official duty, upon the part of his Lordship, and are they bound

to ratify every arrangement of this sort, into which he may think proper to enter? I am stating extreme cases, for they are best calculated to bring out the principle. But, with great submission, if such a doctrine is to be maintained, it will just come to that with which I set out,—namely, that his Lordship is invested with the absolute prerogative of pardon,—a prerogative which, as your Lordships know, is not intended to be exercised, even by the Sovereign, in the shape of arbitrary and capricious interposition, but for the purpose of furthering the general ends of justice; and this extraordinary pretension is asserted without a vestige of principle, or a title of authority to support the claim which is now put forward. In order to explicate a case, it is not only to its immediate result that we must look, but to every thing to which it may lead, and to the remotest consequences that may flow from it.

Mr M'Neill.—I have nothing to state in addition to what was formerly urged at the Bar, and is now contained in our printed information.

The Court then proceeded to deliver their opinions *seriatim*.

Lord Gillies.—The Court owes a debt of thanks to the Counsel on both sides, not only for the very great ability with which this case has been argued, but also for the punctuality with which the order of Court has been obtempered. The papers are drawn with great care, and reflect much credit on both my learned friends. This case is brought before us by a bill of advocation, suspension and liberation. It originated in a warrant for the detention of William Hare, with a view to his examination and committal, if there were just cause found against him, until liberated in due course of law. A petition was then presented to the Sheriff; and it may be proper to attend to the prayer, which is in the following terms:—'May 'it therefore please your Lordship to take into consideration 'the circumstances above set forth; to recal the warrant on 'which the petitioner is committed, and to ordain him to be 'set at liberty; also to put a stop to the precognition or ex-'amination of witnesses; and to ordain the same, in so far as 'it has already proceeded, to be delivered up to your Lord-'ship's clerk, or such other person as your Lordship shall ap-'point, in order to the same being sealed and retained, to a-'bide the future orders of your Lordship, or other competent 'Judge of Court; or to give such other relief in the premises, 'as to your Lordship shall seem proper.' Upon this petition the Sheriff, after hearing counsel, pronounced the following

judgment;—'The Sheriff having resumed consideration 'of the petition for William Hare, and having heard the 'counsel for William Hare, and the respondents, Janet Wil-'son, senior and junior; In respect that there is no decision 'finding that the right of the private party to prosecute is 'barred by any guarantee or promise of indemnity given by 'the public prosecutor, refuses the desire of the petition; but, 'in respect of the novelty of the case, supersedes farther pro-'ceedings in the precognition before the Sheriff, at the in-'stance of the respondents, till Friday night at seven o'clock, 'in order that William Hare may have an opportunity of ap-'plying to the Court of Justiciary.' The question before us then is, whether we are to affirm this judgment, or to reverse it, and grant the prayer of the petition?—a question of considerable importance, and by the admission of both parties, an open and undecided question.

The facts out of which this question has arisen are but too well known. In the beginning of November last, it was discovered that various murders had been committed in this place, unexampled and alarming from their atrocity, and still more from their peculiar object, which was such as to introduce a system of crime, and to render indiscriminate murder a trade, profitable in proportion to the number of its victims. They were not committed from motives of revenge, nor even as the means of perpetrating robbery, or concealing crimes, but to render the human body itself an article of cold-blooded traffic. These crimes attracted the attention of his Majesty's Advocate; he instituted an inquiry; and of his proceedings we have now a distinct, satisfactory, and authentic account. Indeed, all of us are much indebted to the wisdom and prudence of that high officer. When this scene of horrors was first disclosed, it must have been the wish of every mind, that all persons concerned, directly or indirectly, in such atrocities, should be brought to condign punishment. That this feeling existed as strongly in the mind of the Lord Advocate, as in any of us, I firmly believe. But he had the good sense not to give way to it. He wisely thought, that the great object was to *ensure* the punishment of two, or even of one of the guilty, rather than that the whole should escape from justice. And the result fully justifies his conduct; for, by his wisdom and prudence, the law and justice of the country have been rescued from the stain which must have attached to them had such crimes escaped without punishment. From this indelible disgrace he has saved the country. With a degree of prudence and foresight, which, after what has since happened, cannot be too much commended, he thought it right to come prepared with an accumulation of proof and

evidence, such as, in no other part of the world perhaps, could have been thought necessary. With this view, and for the reasons so well stated by himself, he caused the proposition to be made to Hare,—the proposition of becoming evidence, coupled with an assurance, 'that if he would disclose the 'facts relative to the case of Docherty, and to such other 'crimes of a similar nature committed by Burke, of which he 'was cognisant, he should not be brought to trial on account 'of his accession to any of these crimes.' And, whatever may be the judgment on the present question, I think this assurance was properly given; *first*, Because the Lord Advocate could not foresee that a private party would choose to prosecute; *secondly*, Because his intention must have been to examine Hare as a witness in each case in which he promised impunity, and so bring it within the practice of the Court; and, *thirdly*, Because, above all, he was entitled to pledge his responsibility for a pardon or remission. In this respect, he was in the same situation with the prosecutor in England.

In this state then the trial comes on. The indictment charges Burke with three murders; and Hare is in the list of witnesses, and might have been examined as to one or as to all the three. But an objection was stated to the indictment, on the ground of an accumulation of charges, (I only speak from the record, not having been present at the trial); and after hearing a very full argument, your Lordships pronounced a special interlocutor in the following terms:—'The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the indictment against William 'Burke and Helen M'Dougal, pannels, and having heard 'parties' procurators at great length upon the relevancy 'thereof, find the indictment relevant to infer the pains of 'law; but are of opinion, that in the circumstances of this 'case, and in consequence of the motion of the pannels' 'counsel, the charges ought to be separately proceeded in; 'and that the Lord Advocate is entitled to select which 'charge shall be first brought to trial; and his Majesty's Advocate having thereupon stated that he means to proceed at 'present *with the third charge* in the indictment against both 'pannels,—*therefore remit* the pannels *with that charge*, as 'found relevant, to the knowledge of an assize, and allow the 'pannels, and each of them, a proof in exculpation and alleviation, reserving to the public prosecutor afterwards to 'proceed under this indictment against the said William 'Burke, upon the other two charges contained therein.'—This interlocutor finds the *whole* indictment relevant; but the *only* charge remitted to the Jury, and the *only* one of which

a proof could be led, was that which related to the murder of Docherty. So far the record. As to the other proceedings in the trial, it would be unbecoming in me to speak. I was not present; and the information I have obtained, is derived from sources perhaps inaccurate, and most probably defective and imperfect. For these reasons, in so far as the proceedings at the trial, (other than the record), are founded on as of importance, I would have wished that I had not been called upon to deliver my sentiments before hearing those of your Lordships who were present upon that occasion. To this part of the case, therefore, I will not venture to address myself, farther than to mention two remarks. 1. There is an *apparent* inconsistency in the opinion of the judges, as given in the report; I say apparent, being convinced that it must be only apparent, and that it may by your Lordships be explained and reconciled. I shall only add, that the explanation attempted in the Information for Hare, does not to me appear to be at all satisfactory. 2. I may venture to observe, with reference to the credibility of the witnesses, that the opinions expressed to them, and the admonitions delivered to them at the time of their examination, are of more importance than the actual state of the law. These witnesses could not know how the law stood; they must have taken it as explained to them; and, therefore, upon the supposition, which I am far from stating as a true supposition, that those explanations were at variance with the law, the credibility of the witnesses in the minds of the jury, should have been weighed according to the former, and not according to the latter. On a question put to him, if Hare is told that the Court can or can not protect him in answering it, the credit due to him, so far as the situation of safety or of peril in which he stands is a test, must be regulated by the information so given him, whether the same be agreeable to law, or otherwise. In short, in this respect, the impression on the mind of the witness, when examined, as to what the law is, is of more importance than the actual law itself.

I now willingly quit this part of the case, especially as I think that the proceedings at the trial cannot preclude or be held as decisive of the question at present before us. On this I shall proceed to state my opinion, which I do with the greatest deference, and the most sincere respect for the opposite opinions expressed, if any such were expressed, at the trial, as may be expressed now.

The question is, whether we are entitled, and have powers, by law, to quash the proceedings against Hare by Wilson's relations, in consequence of what took place at his precognition,

or at the trial of Burke? And, *first*, I conceive, that, in the general case, the legal right and title of the private party to prosecute is clear and indisputable. I mention this only because, in the information for Hare, it is represented as a sort of antiquated and discountenanced privilege, rather than a well ascertained and clearly defined right. There is an admission on the subject in these terms:—'Nay, there even yet remains 'to such private party a right to enforce the debt due to the 'community, in a certain form, and under certain restrictions, 'when the public prosecutor, to whom the interests of the 'community are entrusted, has neglected to interfere, or to 'attend to those interests.'—p. 9. This very limited, and guarded admission, may be contrasted with the authorities cited in pages 5 and 6 of the paper for the Wilsons. Mackenzie, in referring to the act 1587, cap. 77, and a prior enactment, 1436, observes, that pursuits at his Majesty's instance are only subsidiary; and that, from these acts, 'two things may be 'concluded,—1*st*, That, of old, it was doubtful if the King 'could pursue private crimes without an accuser;—2*dly*, That 'pursuits, at his Majesty's instance, for private crimes, are 'yet only subsidiary, and allowable, if parties be silent or col-'lude,' &c. Mr Burnet states the original practice, and the manner in which it now subsists, in the clearest terms:—'In 'many cases, indeed, long after the institution of King's Ad-'vocate, we find it objected, that he could not prosecute with-'out the concurrence of the party injured, or his kinsmen. 'This, at all events, is clear, that the proper and original 'form of prosecution with us, was in the name of the private 'party injured, who accordingly prosecuted, not merely for 'reparation and redress to himself, as an individual, but for 'punishment and reparation to the public; and hence it was 'that this form of prosecution continued, and still subsists, with 'the same effect, and to the same conclusions as to the full pains 'of law, as a prosecution at the instance solely of his Majesty's 'Advocate.' Baron Hume states the right of the private party, as at present existing, to be as strong, in every respect, as that of the public prosecutor. 'First of all, it is to be noted, 'that the title of the private party embraces, in every instance, 'the full pains of law, not only the private interest of dama-'ges, *solatium*, and expenses, but the same high and personal 'conclusions of corporal, or other chastisement, wherein the 'Lord Advocate, for the interest of his Majesty, might insist. 'Thus, in case of homicide, a libel at the instance of the wife, 'or the kinsmen of the deceased, is as good towards inflicting 'the highest vengeance of the law on the body of the culprit, 'if he is found to be a murderer, as it is in a case of culpable

'homicide for recovery of the assythment, or pecuniary con-
'sideration which is then due to the kindred.' Again, after stating that a public accuser in crime was introduced for the purpose of preventing offences from going unpunished, Mr Burnet says:—'This seems the principle on which private, as 'well as public prosecutions, are founded; and while one ope-
'rates as a check upon the other, to prevent, on the one hand, 'the feelings of humanity, and a wish to *compound* the crime, 'which may sometimes actuate the individual,—and, on the 'other, the partiality and undue bias which may sometimes 'actuate the public accuser from interfering with the interest 'of public justice; both conspired to the same end—the secur-
'ing the punishment of offenders. It is, indeed, the union of 'these two modes of prosecution, that constitutes the pre-em-
'inence of the criminal jurisprudence of Scotland, and distin-
'guishes it from that of most other countries of Europe. It is 'by preserving both in due vigour, that public justice is effec-
'tually secured,—that the remissness, or partiality of the pub-
'lic accuser, is, on the one hand, guarded against,—and the 'too great lenity and forbearance of the individual corrected, 'on the other. Hence it is, that with us no prosecution can, 'in any instance, be stifled, and the feelings of the individual 'or kinsman outraged, by a denial of justice; while, in other 'countries, the *nolumus prosequi* of the public accuser stops, in 'many cases, any process at the instance of the party injured; 'and his rarely interfering to prosecute in his own name, oc-
'casions, in many instances, a remissness in the execution of 'the law.' But why resort to authority on such a point? It is the daily practice for private parties to prosecute; and lately, almost all prosecutions for forgery were at the instance of the Banks, with the concourse of the public prosecutor. Even in a case of murder, I may mention the well known trial of Captain M'Donough, in December 1802. I am old enough to have been counsel in that case. A prosecution was instituted,—the most eminent counsel were retained, and appeared for the prisoner,—and I state, with a distinct recollection of the subject, that no objection to the right of the private party to prosecute was ever so much as hinted at. On the contrary, it was admitted to be as sacred, and as indisputable, as that of the Lord Advocate. But while my learned friend, Mr M'Neill, denies this, he admits, in the most unqualified terms, the right to sue for damages. 'The pub-
'lic prosecutor (says he) watches over the interests of the 'community, in regard to prosecutions for *punishment*; and 'he cannot be controlled or hindered by the private party. But 'the private party has an absolute right to sue for composition

'or reparation for the injury done to his feelings or estate; '*and in this suit he cannot be controlled or hindered by the pub-* '*lic prosecutor.*' This admission I think true; but I am not sure that Hare's counsel was aware of the consequences to which it leads. His Lordship cannot hinder the private party to sue for a composition or reparation. But Hare requires your Lordships to quash the whole proceedings, by which the right of Wilson to an assythment may be controlled and defeated. Were he to plead on a remission, that of itself would found a claim for an assythment; but it may not so easily be obtained if these proceedings are quashed.

With regard to assythment, it is not easy to say when and how it is due, and by what means it is made effectual. There are but few cases on the subject, and none of them are mentioned in the informations. I have looked into the authorities. however, and find that it has been given in these situations:—1. When a remission was pleaded. 2. Where the party was convicted of murder by the sentence of a Court-martial, but only sentenced to be cashiered. 3. Where the party was fugitated. The first occurred in the case of Key *v.* M'Neil, Feb. 15. 1717; the second in that of M'Harg *v.* Campbell, Kilberry, July 29. 1767; and the third in that of Stuart *v.* Lord Fife, July 1767, where an assythment was found due by the donatory of the estate which had escheated to the King in virtue of the outlawry. These two last cases occurred in the Court of Session, and in the last proof was offered but not allowed, the outlawry being held sufficient. Perhaps, it may be said here, that the pursuers may go to the Court of Session, or the Jury Court, and prosecute for assythment; but there is no precedent for such a proceeding; and the regular and natural course is to originate it in this Court. The proceeding now going on, however, might have terminated in laying the foundation for a prosecution for assythment; and yet this is to be defeated by the public prosecutor, who is admitted to have no power to control or hinder a claim of assythment,—and most justly so admitted, for no pardon can affect it. But it may be said, that in those cases where exemption from trial is acknowledged, by the *socius* being examined at the trial, the assythment is in like manner defeated. But there is here an obvious distinction. In the supposed case there *is* a trial for the murder, and if that terminates in a capital conviction and execution, the private party is held to be satisfied; if in a pardon, he gets assythment from the person tried; if in an acquittal, there can be no claim for it, and the presumption must be that murder has not been committed by the prisoner or witness.

Here, however, the avowed object, and only avowed object, is to bring Hare to trial for murder. And the title and right to prosecute being clear, the question is, if we have legal powers to prevent the trial. Is there any law by which, in consequence of Burke's trial, where Hare was not examined as a witness in regard to Wilson's murder, this clear and unquestionable right in the abstract can be defeated?—This is a dry, and, in its practical result in this case, a very unimportant question of law. In the information for Hare, we are not favoured with any precedent in point; but we are desired to look at the principles on which the admitted practice, under different circumstances, when there has been a trial for the murder, and the *socius* has been examined, is founded, and to apply and extend those principles to the present as an analogous case; and humanity, justice, and policy, are said to bear out the claim. These are fine sounding words, and, in the abstract, very good things; but to apply them, or to entrust judges with power to apply them to a particular case, may not be so easy or so safe. To require a Judge to decide on principles of humanity, justice, and policy, is to require him to decide on what he *thinks* humane, just, and politic; in other words, to pave the way for the most arbitrary and despotic procedure. Upon the principles of humanity, as I have already stated my opinion, immunity should be given; but because I *think* this, does it follow that I, or this Court, have power to give it? This is the true question. Let us now attend to the history and progress of our law on this subject.

Anciently a *socius* was not admissible, (this was the *general* rule at least), and had no immunity. Then comes the act of Parliament, 21 Geo. II. c. 34; and this is most important, as the only statutory law on the point. By that statute, which narrates the theft, and masterful seizure of cattle in the Highlands, and the expediency of preventing the recurrence of this offence, it was declared not to be a good objection to a witness, 'that he was himself *particeps*, or *socius criminis*; nor shall 'the evidence, (it is provided), given by such witnesses, be 'made use of against himself; nor shall be liable to be pro-'secuted for his accession to the offence which he shall, as a 'witness, give evidence, that the same was committed by the 'prisoner or pannel on whose trial he shall be adduced, or 'that such prisoner or pannel was art and part thereof; any 'law or practice to the contrary, notwithstanding.' Now, 1*st*, It is an incontestible inference from this statute, that previously an accomplice was not considered admissible:—2*d*, It confines the admissibility even to a particular class of crimes:

—3d, It declares his immunity in these only partially, viz.—*first*, that the evidence he gives shall not be made use of against him; and, *second*, that he shall not be tried for the offence, if his evidence prove the guilt of the prisoner. Here, then, is a resting place; and we see distinctly how the case stood in 1748.

Twenty-eight years after, that is, in 1770, the case of Jameson occurred. This case is thus reported by Mr Burnet:—It will be observed, that the report of the case is contained in a note upon the text of that learned author's work, in which he states it to '*now* (in Mr Burnet's time,) held, that the very 'act of calling and examining an accomplice, as a witness on 'the part of the Crown, *goes far* to operate as a discharge or 'acquittal to him from all prosecution for that crime;'—a passage, in which it will be observed, the doctrine is not directly laid down, that the witness is discharged of the crime; but merely that his examination may *go far* to operate as an acquittal from the crime as to which he is examined. The note is in these words:—'In the case, accordingly, of Macdonald and 'Jameson, in August 1770, when the objection of a witness 'having been *socius criminis*, was fully debated, the prosecu-'tor, in answer, did not say that the witness, *by being examin-'ed, would thereby be exempted from prosecution, but only that 'he might hope for impunity;* while the usage, at that time, of 'granting special pardons to accomplices, for enabling them to 'give evidence, confirms what has been stated. At what pe-'riod a different rule came to prevail, does not appear.'

At this time, all the length gone was to admit the *socius* in cases not specified in the statute. This was an extension of the law, but it was the only extension, for the power of the Court to screen the witness from trial, is not hinted at.

Next, and only eighteen years after, comes the case of Brodie, which I remember, though I was not present at the trial. There was no very authentic account of the trial. Two rival publications appeared, under the auspices of Mr Creech, and Mr Æneas Morrison, and *one* of them only contained the dictum of the Lord Justice-Clerk. If accurate, it is curious to see how, in eighteen years, the law should have been so much altered. But attend to Downie's trial in 1794. This is, in fact, an English case, but the opinions given refer to Scottish law, and Scottish practice.

The Lord President of the Court stated his own practice in criminal cases, and that, when he was Lord Advocate, he understood that he could not, after making use of a *socius criminis* as a witness, bring him to trial for the same crime; but he requested to be informed as to the law of England, and

then proceeded to say, that if he was assured 'that the wit-
'ness runs no risk of being prosecuted himself, being virtu-
'ally or expressly liberated from the charge, so far as he
'himself may be concerned, in consequence of his being call-
'ed as a witness, and speaking out the truth in this trial, it
'will be my duty to tell him, that he is bound to speak out
'the whole truth, and that he is in safety to do so.'

The observations of the Lord Chief Baron are of material consequence, because he states the practice:—'I served a 'good many years as prosecutor in this country, and I always 'understood, when I brought a *socius criminis* as a witness, 'that my hands were tied up from the prosecution of him for 'any thing spoken at the Bar. But if he would not speak 'out, I thought myself at liberty to prosecute him for any 'thing he did not speak out; a person being brought to the 'Bar, and not speaking, should that protect him from trial 'for any offence, when he is only protected for what he shall 'speak upon the trial?'

Lord President.—'I am of the same opinion. If he re-'fuses to speak, he is not a witness,—he may be put back to 'his former situation.'

Lord Advocate.—'What the honourable Judge has stat-'ed is perfectly right, and the law.'

Lord Eskgrove.—'I never knew of an attempt made by 'the prosecutor to bring afterwards to trial for the same crime, 'any person who had been examined as a witness upon that 'crime to which he had been accessary, and who had not re-'fused to give evidence, but had given evidence. I had con-'ceived a notion in my own mind, that if such an attempt 'should be made, the Judges who are to determine upon the 'law of the land, as it strikes them, would not suffer a per-'son so circumstanced to be subjected to a trial, and, conse-'quently, that it is not optional in the public prosecutor to 'bring him to trial or not, for that the Court would interfere, 'and prevent such trial proceeding, although that case has 'not yet occurred. I therefore think there is no place for the 'objection in his (Aitcheson's) case; and, with respect to 'any other witnesses, I am of the same opinion with your 'Lordships; it is not competent for the prisoner's counsel to 'object, although the witness himself may decline to answer 'to questions tending to criminate himself; but if he chuses 'to answer and give evidence, I conceive he will be secure 'against any future prosecution.'

This then was the law in 1794, thirty-five years since, from which it appears that a *socius* was safe; first, if he was *examined* as a witness; and second, if he *spoke out*. Such un-

questionably, is the amount of the opinions of Sir Islay Campbell, the late Chief Baron Montgomery, and Lord Eskgrove. According to Burnet, this law continued much the same in his time. Calling as a witness, says he, *goes far* to operate a discharge or acquittal to him from all prosecution for that crime in regard to which he is examined.

We come now to very recent times. The case of Dreghorn, and many others, in which the undoubted *practice* has been to inform a witness on his examination, that he cannot be tried for the offence or charge of which he is expected to give evidence. This practice is *a great extension* of the act of Parliament. Whether it was warrantable at first, I should *humbly* doubt; but now it is too long established, and too *generally prevalent*, to be called in question. But does this practice avail the accused here? By the acknowledged practice, the act of Parliament is extended to all cases, and to all *socii* examined, whether they spoke out and gave evidence or no, instead of being limited to those who do speak out and give evidence, as provided by the act of Parliament.

But here a much greater, and, I believe, a *new* extension is required, viz. that protection is the right of *socii not examined at all*, in regard to the offence with which they are charged, and where there has been no trial for that offence. This is a great extension indeed, but altered circumstances are said to justify it. And, first, of the precognition and promise of the Lord Advocate. This *per se* is surely not sufficient. Can we hold that a *promise* of pardon by the Lord Advocate is equivalent to a pardon by the Crown; nay, much more; for the one leaves assythment and gives claim to it, which the other takes away? But then he was cited as a witness to the indictment containing this charge, and the indictment was found relevant. True, but *this charge* was *not* remitted to a Jury, nor could be subject of proof by the prosecutor. This is said to be a distinction of no consequence. I cannot bring myself to think so. In *all* the authorities, Campbell, &c. to which I have referred, they *all* think the examination *essential*. But above all, attend to the act of Parliament, the only one we have;—it introduces and enforces this distinction, and only gives impunity to him who has been examined, and *not* to him who may have been cited and not examined. It is said Hare was ready and willing to give evidence, and so I believe. But this we *cannot know*; and, at any rate, an examination as witness, which *alone* by law, even as extended by practice, gives indemnity, did not take place.

If general considerations of humanity, or justice and policy, shall still be urged, I must make another answer to them.

These considerations are just as strong, and must operate as powerfully in England as here. But in England the Courts do not assume a power, because they are, or think they are, to make a humane exercise of it; and we are, I think, in the same predicament. The intended exercise of the power may be salutary, but this cannot give the power. The redress is lodged, however, in England in safer hands, in the Crown.

But there is one consideration which I have not yet noticed, viz. the dangerous power to screen from crimes. This is a fair argument, though at present of no practical force; and certainly a powerful argument. If it is said that the Lord Advocate has only to bring on the trial and examination to give impunity; the answer is, that by trial the nature of the case, and his improper conduct, (if it be improper), will be exposed to the public.

The Lord Advocate may, no doubt, get a pardon for the witness in such circumstances. But it is one thing to apply for, or obtain a pardon from the Crown, and another thing to have power to give a legal exemption from trial to a criminal, merely by citing him as a witness.

This is a new case; and I am not conscious, and have no recollection, of any such in practice. The argument of the prisoner, however, just comes to this:—Our predecessors have extended, or stretched the law so far; and therefore we, in virtue, or in consequence of that stretch, are entitled to stretch it still farther. This has always seemed to me a most dangerous doctrine, and I have always humbly thought it one which the Court should reject and discountenance to the utmost.

Lord Pitmilly.—I have paid every attention in my power to the consideration of the important and interesting question now before us.

In delivering my opinion upon it, I must begin by observing, that I entirely concur in the remarks so eloquently and forcibly made by Lord Gillies, on the conduct of this case; and I shall not repeat or add to what has been already said on that topic.

My next remark is, that I do not think it necessary or proper to notice the proceedings when Hare was under examination, because I was not present, being obliged, by indisposition, to retire from the Court, and to leave it to those who had this painful duty to perform.

I shall have occasion to notice, in the course of my observations, some other points which were touched on by my Brother; but, at present, I hurry to the consideration of the ques-

tion now before us, which is, whether we should put a stop to the proceedings at the instance of the private party, or should follow a different course. If I cannot say that I concur in the view taken by Lord Gillies, it was at least a great satisfaction to me, to hear his Lordship declare that 'the practical result is unimportant:' There are, in fact, two roads to the same object; and, if principle were not involved, I should be happy to travel with such a companion as Lord Gillies.

In forming an opinion on this interesting question, it is necessary to attend, *first*, to the situation, in the general case, of a *socius* who has been called and examined as a witness; and, *secondly*, to the situation of the suspender, Hare, both with reference to the prosecution at the instance of the public and of the private party.

And, *first*, in considering the nature and degree of protection afforded to a *socius* who is a witness, we cannot expect to derive much advantage from the older authorities.—The general tendency of the old law was to exclude accomplices, except in particular cases. In this we differed from the practice of the Courts in England, for there they were always admitted. —Phillips, I. 37. We followed an opposite practice, and we cannot look for rules as to protection, drawn from times when the accomplice was excluded. It is only after the rule was reversed, and *socii* were admitted in every case, reserving the question of their credibility to the Jury, that we are to look for the conditions of the protection afforded them, and to expect, as the system was matured gradually, and in the course of practice, that these conditions would be evolved and defined. The progress of our law in this respect, as in almost all others, has been gradual, as indeed appears to have been the case also in England,—witness the old doctrine there of *approvement*.

It is necessary to keep in view the grounds and reasons of the tendency of our practice to reject the testimony of accomplices, in order to see what was to be guarded against when the testimony of *socii* came to be admitted.

Now, in the *first* place, there is no doubt that, in the earliest periods of our law, bad character operated in part as a ground of exclusion;—indeed, there were many objections to admissibility, to be judged of by the Court, which now go by the credit of the witness alone, and are consequently reserved for the Jury. Among these infamy was one; but the distinction between *infamia juris* and *infamia facti*, has existed long,—indeed ever since 1671; and hence the latter could not remain the ground of inadmissibility.

But, *secondly*, interest formed a ground of exclusion; and this continued to influence the Court and the lawyers much

later than the time of Sir George Mackenzie. Mr Erskine's Treatise on Crimes is not accounted so good an authority as that part of his work which relates to civil matters; but I quote the following passage, in evidence of the general understanding on the subject at the time when the work was published, (1773), and also of the grounds upon which it rested. '*Socii criminis*, (says this author), or associates in the same 'crime, are not admitted to bear testimony against one another,—not so much because they are accounted infamous, 'as because they have an obvious interest in the event of the 'suit,' &c.—Book IV. c. 4, § 96. He states exceptions to this general rule, however, and, among others, the act 21 Geo. II. c. 34.

As interest then was a ground of exclusion, it is necessary to attend to the progress of the law in removing that objection.

The only general statutory enactment on the subject is the 21st Geo. II. c. 24. But this statute, when duly attended to, will, I think, appear to be chiefly and only useful in tracing the history and progress of the law, and I cannot concur with my brother in holding it as a 'resting place.' For, *first*, it was made for punishing particular crimes; and, *secondly*, it formed no general rule even as to these crimes. Accordingly, there is another section of the act, not noticed by counsel, which makes very different provisions, from the section to which reference has been made by counsel and by Lord Gillies. Section 20 provides, that, 'It shall not be allowed to be a 'good objection to any witness, produced for proving such 'libel or indictment, that he was himself *particeps* or *socius crminis*, nor shall the evidence given by such witness 'be made use of against himself, nor shall he be liable 'to be prosecuted for his accession to the offence, which he 'shall, as a witness, give evidence that the same was committed by the prisoner or pannel, in whose trial he shall be 'adduced, or that such prisoner or pannel was art and part 'thereof; any law, custom, or usage to the contrary notwithstanding.' But section 21st provides, that 'it shall and 'may be lawful and competent to produce as witnesses other 'persons present who may also have been guilty of offending 'against the said act; but the evidence given by such witnesses shall not be made use of, or given in evidence against 'themselves, upon any prosecution for any penalty inflicted by 'the said act;' thus implying that there may be prosecution, but that the evidence of a person so situated cannot be used against himself. Historically then, this statute is of great weight and authority in the argument, and it must regulate the

practice in the two particular cases for which it makes provision; but it cannot be held up as fixing the general law of Scotland, with regard to the admission of accomplices as witnesses in all cases whatever. If we were to be guided by it in cases to which the terms of it do not apply, we should be at a loss to know, by which of the two enactments, so different from each other, we ought to be regulated.

The next notice we have of this question is in the trial of M'Donald and Jameson in 1770, and there, as Mr Burnet says, p. 418, all that was promised was, that the witness might *hope* for impunity if he spoke the truth. As to Lord Chief Baron Montgomery's remark in Downie's case in 1794, it is merely a statement of his practice when he was Lord Advocate, and therefore is just a repetition of the principle laid down in the case of M'Donald and Jameson.

But the law was authoritatively laid down, and for the first time explained to a witness, in the case of Smith and Brodie in 1788. It is a mistake to suppose, however, that any new doctrine was broached upon this occasion; the only thing new was the fact of making an explanation of the law to the witness. There were then on the Bench Lord Justice-Clerk Braxfield, and Lords Hailes, Eskgrove. The judges on that occasion were only declaring the law, and this was the first time the declaration was made to the witness; which circumstance was the only novelty that occurred. I have read both reports of the trial, that published by Mr Creech, as well as that published by Mr Morrison, and I do not find any material discrepancy between them on this particular point. I see the Lord Advocate states the law, which the Dean of Faculty, (Mr Erskine), does not deny, but rests upon specialities, putting his objection on the distinction between the situation of the individual witness with whom he had to deal, and the common case of an accomplice.

But I do not rest on that case alone. Our practice has never varied since, and has been followed in at least a hundred instances; and surely if a train of practice can regulate any proceeding, the point in question must be considered firmly fixed by the law as then laid down, and since observed, without a single deviation, in every subsequent case in which a *socius criminis* has been brought forward as a witness.

And here, I cannot avoid remarking, that the objection, in point of principle, to this practice, is by no means so formidable as it has been represented to be. Is the objection to this on principle? There is a great error in placing the protection which a *socius*, taken as a witness by the public prosecutor,

receives, on the same footing, in all respects, as the immunity which an offender obtains as grace and favour by Royal pardon. For what is the progress of the former? *First*, The accomplice is to be selected and induced to speak; and this with us must lie with the prosecutor, who is *dominus litis*:—*Secondly*, He comes forward in the eye of the Court, to perform his promise. In the nature of things, the prosecutor is the party who must arrange, and the Court must judge of this transaction.

The practice in England has been referred to. But there, if I do not misunderstand it, although a pardon from the Crown is resorted to, as the form of securing protection to the witness, the 'practical result' is nearly the same as with us, and the Court takes a very efficient part in bringing about the protection. The best information on this subject is to be found in Lord Mansfield's speech, in Mrs Rudd's case.—(Cowper and Leach, i. 118.)—'There is besides a practice, which, indeed, 'does not give a legal right, and that is, where an accomplice, 'having made a full and fair confession of the whole truth, is, 'in consequence, admitted a witness for the Crown, and his 'evidence is afterwards made use of to convict the other of-'fenders. If, in that case, he act fairly and openly, and dis-'cover the whole truth, though he is not entitled of right to 'a pardon, yet the usage, the lenity, and the practice of the 'Court is, to stop the prosecution against him; he having an 'equitable title to a recommendation for the King's mercy.' In that case, eleven of the twelve Judges assembled to deliberate and determine whether Mrs Rudd had 'an equitable 'title to a recommendation for the King's mercy.' They thought she had not, and she was accordingly tried and acquitted. But, if they had come to an opposite conclusion, we may venture to say, she would have been protected from trial.

There is, indeed, a case mentioned by Lord Mansfield, (Leach, p. 121,) where the trial was stopped.—'I am appris-'ed, (says his Lordship,) of the case of an accomplice upon 'a trial before Mr Justice Gould, the circumstances of which 'were as follow:—An accomplice made a fair and full dis-'covery, to the satisfaction of Mr Justice Gould, who tried 'the other offenders. The other witnesses who were called 'upon the trial, proved the identity of the accomplice, by the 'description of his person, but failed as to the identity of the 'other offenders; and the Jury, because they doubted of the 'guilt of the others, acquitted them. The counsel on the part 'of the prosecution then contended, that the accomplice ought

'to be tried; but Mr Justice Gould, under the circumstances 'of the case, was of a contrary opinion, and I think very 'rightly.'

Blackstone gives a beautiful description of the Royal prerogative of mercy; but in another part, (B. IV. c. 25,) when writing of this practice, his words are:—'It hath been usual 'for the Justices of the Peace, by whom any persons charged 'with felony are committed to jail, to admit some one of their 'number to become a witness against his fellows; upon an 'implied confidence, which the Judges of Gaol Delivery have 'usually countenanced and adopted, that if such accomplice 'makes a full and complete discovery of that and all other 'felonies, to which he is examined by the Magistrates, and 'afterwards gives his evidence, without prevarication or fraud, 'he shall not himself be prosecuted for that or any other pre-'vious offence of the same degree.' No doubt pardon is obtained, but the substratum of the immunity, is the recommendation of the Court.

I ought not, perhaps, to have said so much with regard to the English practice. Our own practice, by which we ought to be regulated, has ever since 1788, at least, been confessedly firm and undeviating.

I come now to consider the case of Hare. And *first*, with reference to the public prosecutor. It is needless to say much on this part of the case; for, on *the point of fact*, the statement of the Lord Advocate is most satisfactory; and I have no doubt the time will soon arrive, when every candid person will be convinced that his Lordship's conduct, in this delicate case, has been as wise, firm, and judicious, as it has been honourable and becoming the high situation he holds. But, in *point of law*, is it not equally clear, that the Lord Advocate, after using Hare's information generally, and his evidence as to Docherty, could turn round and say, 'I did not examine you 'as to Wilson?'

Look next at the right of the private party. Mrs Wilson's plea on this part of the case, is rested upon two separate and independent grounds, which must be kept quite distinct; *first*, Her plea is rested on general grounds; and, *secondly*, On grounds arising from special circumstances.

The general ground is stated thus, under a separate head, (Information, p. 5.):—'The right of the private party to pro-'secute is not controllable by the public prosecutor, and is in-'dependent of him.' Now, if this hold good in the present case, it must apply to all cases. Try it, however, in other cases; if it fails in any, it cannot be good here. It is a general

rule, and as such must be taken *per se*. Now, it is needless to touch on the various instances in which the public prosecutor controls the private party, such as his acknowledged right to restrict the libel, which has grown in practice, and is recognized by the Legislature. For, in the very particular instance now under discussion, it is admitted that he may control in a certain case; it is admitted that a *socius* is protected as to the particular crime respecting which he gives evidence; in short, it is admitted that Docherty's relations could not prosecute Hare for his concern in the murder of that unfortunate woman. And why, but because the public prosecutor has examined Hare, and thus controls the right of the private party.

This establishes the prosecutor's power of controul, and suggests an answer to what was said by my learned Brother, in regard to assythment. For, in the *first* place, our attention was not called to it, nor is the case put upon it in the respondents' information;—*secondly*, Sure I am that he will be a bold man who reads the case of M'Harg *against* Campbell, and Stewart *against* the Earl of Fife, and who will say that the right of assythment is cut off;—and, *thirdly*, The relatives of Docherty have as good a right, and are as well entitled to assythment from William Hare, as those of Wilson; and it would be unjust and iniquitous if they were not. But the relatives of Docherty cannot prosecute, because it is admitted, that, in every case where a *socius* is examined, the private party cannot prosecute. Mrs Wilson, therefore, is only *in pari casu*.

Having discussed Mrs Wilson's argument on the general grounds stated for her, I come now to consider her plea rested on the particular circumstances of the case.

It is said, that as Hare was not examined in Wilson's case, there is no protection. The parties are driven to this narrow point, that because he was not examined as to the particular case of Wilson, he has no immunity.

And the argument is illustrated, by putting a different case from that which actually occurred,—the case of three indictments;—the case supposed is, that the Lord Advocate had raised three separate indictments, one for the murder of Mary Docherty,—a second, for the murder of Mary Paterson,—and a third, for the murder of James Wilson;—that only the last mentioned of these three indictments had been called in Court;—and that Hare had been examined in that single case as a witness. In the supposed case, I agree with Mr Jeffrey in thinking, that the case of Hare would have been equally favourable, *in point of fact*; but it would evidently have been very different, *in point of form*. The Court would have known nothing of him, as a witness in the case of Wilson. And, there-

fore, I should have thought, if the supposed case had happened, that, on the facts being afterwards explained to us by Hare, in the event of an attempt by Wilson's mother to bring him to trial, we might, with propriety, have stopped the proceedings, and given an opinion that he had an equitable title to a recommendation for pardon. In short, such a case would have furnished an instance, in which I humbly think the course recommended by Lord Gillies, though new in our practice, would have been proper.

But the case which has occurred is a different one; and while the case put in illustration by Mrs Wilson's counsel, is not analogous, there is an analogous case, and one unfortunately which has occurred not unfrequently. The case I refer to is, when different acts of the same description of crime are included in the same indictment, and where only one of them is insisted in. Suppose, for example, a person is charged with eight or ten different acts of robbery in the same indictment, and an accomplice is brought forward and examined as to one of them; and suppose the first fact so clearly proved, that the public prosecutor stops short and rests contented; would it be permitted, or possible for the private party to come forward and insist upon proceeding with the cases not tried? I hold that it would not; and I lay it down as a proposition, which it is impossible for any man to dispute, that the *socius* would be protected, and that the private party could not try him as a criminal upon any of the charges, in regard to which the public prosecutor could not insist against him.

I have little more to say concerning the matter now before us. I feel intensely for the relations of Wilson: I sympathize also with the public desire to bring a great criminal to justice. But I feel more for the security of the law; and I hold no consideration so important, as that public faith, pledged by a responsible officer, and sanctioned by the Court, in pursuance of uniform practice, should be kept inviolate, even with the greatest criminal. After all, however, there is no great difference between us. There are two roads to the same object, and the practical result is the same. If I thought there was a defect of legal right, I would approve of a recommendation, but I prefer following our own usages and analogies.

Lord Meadowbank.—Ever since this question was first presented for the consideration of your Lordships, it has appeared to me to be one of infinite importance in whatever point of view it be taken;—whether as affecting the life and liberty of the complainer,—the consistency of your Lordships' judgments,

and their consequent respect with the country,—or the powers of the first law officer of the Crown, entrusted to him for the public interest of the King and of the realm. I have, my Lords, however, at no time considered it to be attended with difficulty; and I have never seen reason for thinking that the view in which it occurred to me in the course of the trial of Burke, was at all doubtful. On the contrary, the opinion which I then expressed to your Lordships when you referred to my brother and myself as to the situation in which the complainer stood when he gave his evidence relative to the murder of Docherty, founded upon the general impressions of the law, which I had acquired during a pretty long practice in this Court, has been entirely and fully confirmed by the arguments I have heard from the Bar, and the researches I have since made into books of authority and the records of this Court. In making this investigation, I assuredly felt, my Lords, that it was incumbent upon me to divest my mind, as much as in the nature of things it was possible to divest it, of all feeling of prejudice and partiality,—and it is with the entire conviction that I was enabled so to do, that I am now prepared to lay before your Lordships the grounds on which I am satisfied that the instruction given by your Lordship to the Jury, in point of law, with reference to the position in which the complainer stood when he gave his evidence, was as sound and impregnable as any that ever was delivered from the chair of this Court.

I am free, however, to acknowledge, that had I arrived at a different conclusion, it would have been to me, as I am sure it would have been to your Lordship and my brother, Lord Mackenzie, a source of deep humiliation and of endless regret; for I must have felt, not merely that we had thereby exposed ourselves to the imputation of ignorance, where our sacred duty required we should be informed,—but that through this great and unpardonable mistake, a jury had been sent to weigh and consider the legal effect due to evidence on which the life of a human being depended, under an impression unfounded and erroneous. Hence, my Lords, I for one felt most deeply anxious that, if possible, the points now under consideration had been determined before the execution of that wretched criminal, who has so recently expiated his cold-blooded and barbarous atrocities on the scaffold; for had I been taught by a solemn judgment of this Court, that the law respecting the immunity of the complainer, as laid down by your Lordship, was erroneous,—nay, had I come to entertain a suspicion to that effect myself, I should have deemed it my bounden duty to have called upon your Lordships to have interposed betwixt

that miserable convict, how guilty soever he unquestionably was, and the consequences of a verdict made up and returned under impressions of the law in that case so unjust and unfounded. Your Lordships will not doubt, therefore, that it has been the greatest relief to any mind to have discovered no ground for doubting the solidity of the law as it was then expounded.

In approaching the consideration of this question, the first point on which your Lordships are called to form a judgment, is, whether the present application has been made at a competent time, and in a competent form.—And upon this branch of the subject, I shall be extremely short. Indeed, except for the apprehension entertained by Lord Gillies, that the Court, by determining now that the complainer cannot be tried for the murder of Wilson, the right of the private party to assythment may be thereby cut off, I understand neither of my brethren to have expressed a doubt as to the complainer having a legal right to obtain at present the judgment of your Lordships, finding that the warrant against him is either legal or contrary to law. Now, upon the question respecting the right of assythment, concurring entirely with the views taken, and the judgment given by Lord Pitmilly, I shall not detain your Lordships longer than to state, that I have no doubt that the public prosecutor, by no compromise whatever, whether made extrajudicially, or by producing a *socius criminis* in Court as a witness, can, in any respect whatsoever, encroach upon the rights of the private party to reparation, whether in the name of damages or assythment; and so I am sure it is laid down in the books, though I am unable at present to say where, from the matter not having been before mooted in the arguments before the Court. With respect to any other ground for doubting the competency of the application in its present form, I have been unable to discover it; for, assuming the statement of the complainer to be true, as given in his paper, (and which, having been read by my Lord Gillies, it is unnecessary for me to resume it,) confirmed, as it now is, by the authoritative account of the public prosecutor, the right and interest which the complainer has to apply to your Lordships for liberation seems to be unquestionable. I shall only observe, in a word, the statement on which this issue is to be tried, is, that from the face of the warrant on which he is incarcerated, it appears that it was granted against him for an offence for which he is no longer amenable to the criminal law of the country. Hence, he says that your Lordships are bound to discharge that warrant, and set him at liberty; and, my Lords, if you are of opinion that the proposition, in point

of law, is well founded, the result contended for must necessarily follow; for he would then seem to me to be in the same position as an individual incarcerated on a charge of witchcraft, which is not cognizable in our tribunals,—or of one charged with a crime appearing from the warrant to have been committed beyond the jurisdiction of this Court,—or of one who had tholed an assize for the crime of which he was accused,—or who had obtained the King's remission,—or having obtained letters of slains from the private party, was, nevertheless, imprisoned at his instance;—in all which cases, I should think it beyond a doubt, that your Lordships would be bound to entertain an application for relief, and, on being satisfied of the facts as stated, to discharge the warrant of imprisonment. Indeed, were your Lordships of a different opinion, the act 1701, founded on the declaration of grievances, and providing that all warrants should bear, upon the face of them, the cause of commitment, would be altogether a dead letter; and the subjects of the realm, without redress, would be exposed to those dangers, against which our ancestors thought they had secured protection, by opening a direct road for relief to this Court, the legal and impartial guardian of the liberty of the subject.

There is still, my Lords, another matter in some measure also preliminary to the main subject of discussion, to which it is incumbent upon me to direct the attention of your Lordships, especially as I shall have occasion afterwards to lay considerable weight upon it, in arriving at a conclusion as to one of the chief points brought under our consideration. This, my Lords, regards the admissibility, in the ancient law of this country, of a *socius criminis* to give evidence respecting the perpetration of crimes, in the trial of offenders. And here, it being my misfortune to differ, not merely from the admissions of the parties at the Bar, and the deliberate opinion of Mr Baron Hume, but even with the judgments of my two learned brethren who have already spoken, I must feel most deeply the difficulties under which I labour, in submitting to your Lordships an opposite view of the question. One thing your Lordships may be assured of, that, under such circumstances, and against such a weight of authority, I should not have done it lightly. Indeed, nothing short of the conviction of the sacred duty incumbent on me, in so important a case, to state the opinion, and the whole opinion, which I have conscientiously formed respecting it, would have induced me to proceed to assert to your Lordships, with great deference, but firmly, and without hesitation, that, as far as I have been able to discover, after as

anxious and diligent an inquiry, as the shortness of the time would admit of since these papers were put into your Lordships' hands, I can see no reason for doubting that, at times as remote as details of criminal procedure in this country are to be found, *socii criminis*, or accomplices, have been admitted in order to give evidence against the accused. No doubt some decisions may perhaps be found, though I am only aware of one (that mentioned by Mackenzie, referred to in the pleadings) in which a *socius criminis* has been rejected; but there are contradictory decisions to be found in all Courts; and fortunately for the subjects and law of this realm, many of the judgments given in the time of Mackenzie will be found to be solitary, and to receive no support from decisions pronounced at periods both more remote and recent. In hazarding this opinion, however, it is some satisfaction to me that, if I differ from my brethren upon this matter, I do so with high authorities in the law, with Lord President Campbell, Lords Justice-Clerk Braxfield and Eskgrove, and, above all, with Lord Hailes, who, in a matter of antiquarian law, is perhaps equal to any authority, or all the authorities that could be mentioned, living or dead.

In establishing the proposition I have undertaken to make out, your Lordships will at once be sensible, that it is necessarily incumbent upon me to have recourse for evidence to trials at a very remote period, and in many of their particulars of most questionable authority. But however unjust such cases may be in the *principles* which they exhibited, however iniquitous, tyrannical, and oppressive they may have been in their results, they are equally authoritative in establishing a matter of practice and proceeding, as trials the most impartial and the most legally conducted. Accordingly, my Lords, while I appeal in support of the proposition, that it was usual in criminal proceedings to admit the evidence of *socii criminis* to nearly the oldest trial which has met the eyes of the public, —that of the Regent Morton,—it is far from my intention to give any approval of the gross and scandalous iniquities that were there exhibited, in order to achieve the disgrace of that iron-hearted and despotic statesman. It is sufficient for my purpose to state, that it appears, that the only proofs which was then brought against him were the depositions of William Powrie, George Dalgleish, John Hay, and John Hepburne of Bowtoun, *socii criminis*, together with the declaration of Nicolas Hubert, or Paris; and that, upon considering that evidence, the verdict of the assize was exclusively founded. The very year subsequent to this trial, a similar point appears to have been ruled in the Court of Session, in a case not altogether of a

civil nature, (the name of which I have omitted to take down,) in which your Lordships will find the doctrine expressly stated and admitted, 'quod in criminibus quæ non possunt committi 'sine sociis *admittuntur socii*.'

The next case confirming the same doctrine, that I have observed, is that of the trial of the persons implicated in the Gowrie conspiracy. From a note in the State Trials, (page 1365), it appears that, upon the evidence of 'Henderson and 'other witnesses, Cranstoun and Craigingelt were panelled 'before the Justiciary at Johnstoun; and, upon clear testi-'monies, and on their own confession at the bar, (which they 'also adhered to on the scaffold), they were both executed;—'only alleging that they did not know of the design to murder 'the King, but that they intended to force the King to make 'great reparations for the late Earl of Gowrie's death, and 'that this Earl of Gowrie was to be made a great man.' Now, the Henderson above-mentioned, your Lordships will find to have been included in the summons of treason against John, Earl of Gowrie, Alexander Ruthven, Henry Ruthven, Hugh Moncrieff, and Peter Eviot, for High Treason. On the summons being called, it appears that Mr Thomas Henrison compeared for the said Andrew Henderson, and produced the writ following:—'It is our will, and we command you, that upon 'sight hereof, ye delete Andrew Henderson, chamberlain to 'umquhill John, Earl of Gowrie, his name furth of the sum-'mons of treason and forfaulture, raised and executed against 'him, for being art, part, redd, counsel, and counselling, of 'the late treason conspired by the said umquhill Earl, his 'umquhill brother and accomplices, against our persons, and 'as you will answer to us hereupon; keeping this presents for 'your warrant. Subscribed with our hand at Holyrood-house, 'the 9th of November 1600. *Sic subscribitur*, Jacobus R.'

His name was accordingly delete from the summons; and in the trial which afterwards proceeded, and, as your Lordships all know, was conducted with more than ordinary form and solemnity, the Duke of Lennox, and the Earl of Mar, the Abbot of Inchechaffrey, and a great many other persons of quality having been examined, were the depositions of Craigingelt and Cranstoun read according to the usual form, when witnesses were not forthcoming themselves, (and both of these had suffered death as accomplices), and Henderson himself, the accomplice, without any remission whatever, was examined fully, and at great length, with regard to the subject of the trial, which your Lordships know ended in the conviction and attainder of the accused.

The next case I have observed, is one mentioned by Hume,

tin, that of Smith, in which Faw and Wilson, both alleged to be *socii criminis*, were admitted, as it is stated by Mr Baron Hume, after an objection made to their admissibility.

About the same time as this last decision was pronounced, your Lordship will find, in nearly the whole of the trials that took place in this Court towards the end of the 17th century, *socii criminis* the chief witnesses against the prisoners; and although no doubt many of these cases, and even some of those that happened after the Revolution, may contain matter which would not be of authority now with your Lordships; still they go to establish, as a matter of fact, that, whether legally or illegally, accomplices were admitted as evidence for the prosecution in criminal trials. In many of those cases, also, it must be admitted, that remissions from the Crown seem to have been granted to such witnesses at this particular period. But such remissions granted before sentence proceeded, in all cases, your Lordships are aware, upon the admission of the party having been guilty of the crime remitted; and as, in no case, it did more than merely grant protection to the individual against prosecution criminally for the offence so admitted, every one of those cases, and they are almost innumerable, affords unanswerable examples of a *socius criminis* being deemed an admissible witness more than a century and a half ago. For your Lordships are not to be told, that at that time the King's remission had no power to take away any *infamia juris*; (Mackenzie, Part II. tit. 26.—No. 6. Dirleton's Doubts, p. 224.—Stewart's Answers.) and, therefore, the remission neither was, nor could be, any thing but a mere protection against trial.

Sometimes, in the course of the 18th century, it will no doubt be found, that counsel did sometimes plead, (as both counsel and parties will constantly be found to plead untenable propositions), that *socii criminis* were inadmissible witnesses by the law of Scotland; but there is not one instance that I can find, in which such a plea ever was sustained by the Court, from the beginning of that century down to the case of Smith and Brodie, of which I am immediately to speak. On the contrary, in the year 1770, we find the objection to have been stated in the case of Jameson, and expressly repelled. In the case of Fairly, mentioned by Hume, in 1775, a bill of advocation, founded upon a similar objection, was refused; and in the case of Smith and Brodie, your Lordships will find that some of the ablest lawyers who ever sat upon the Bench held it as clear, that the objection of *socius criminis* had no place as an objection to a witness in the law of Scotland. And here, my Lords, it is proper to state, that not thinking it fit

to rest my knowledge of what passed upon that occasion merely upon the unauthorized publications which issued from the press at the time, I went to the record, and I there find it laid down by the public prosecutor, who at that time was Sir Ilay Campbell, in the minute upon which the judgment of the Court proceeded, 'that no doubt the witness is a *socius criminis*, being concerned with the pannels in the crime 'for which they are under trial; but however this may affect 'the credibility of the witness, yet it does not by no means affect his admissibility, *as is well known in the practice of this Court*, which practice is of the most salutary consequences. 'That in cases where numbers are concerned in the same crime, 'the public prosecutor must certainly have a power of selection which to bring to trial, and which to call as evidence.' Accordingly, my Lords, upon this statement of the law it was that the Court repelled the objection of *socius criminis*, after mature deliberation, in that trial, which occupied much attention at the time, and was deemed to be one of great and public importance. And upon that occasion, it appears from a note preserved by Burnet, that Lord Hailes expressed himself in the following terms, adverting to what Sir George M'Kenzie says of the usage being to reject *socii criminis*,—'that this assertion of Sir George M'Kenzie was, like many 'others in his work, neither founded on principle nor fact, 'and that there were instances in his day where *socii criminis* were admitted.' The truth of this assertion of Lord Hailes, I hope I have established to the satisfaction of your Lordships, from the authorities I have quoted, many of which occurred in the state trials towards the close of the seventeenth century, and during M'Kenzie's own time. And it does not appear that one of the eminent lawyers then on the bench expressed a doubt of the justice of the opinion of Lord Hailes.

Accordingly, a very few years afterwards we find that Sir Ilay Campbell, Lord Chief Baron Montgomery, (himself Lord Advocate at the time the objection was repelled, in the case of Jameson), and Lord Eskgrove, did, one and all of them, in the judgments they delivered in the case of Downie, afford the most conclusive evidence of their understanding that the admission of *socii criminis* as witnesses was of ancient and inveterate practice.

As to the opinion of Erskine upon this subject, as quoted by Lord Pitmilly, I shall say nothing, because every one knows that part of his work to be of no authority whatsoever. But in this case it is more particularly of none, as he seems to have been utterly ignorant of the decision solemnly pronounced, only three or four years before his work was published, in

this Court, repelling, in the case of Jameson, the very plea of *socius criminis*, which, in the passage referred to, he states to be one universally recognized in the law of Scotland.

Indeed, my Lords, I have never been quite able to understand how, according to our forms, the objection of *socius criminis* could be regularly stated to the *admissibility* of a witness. For many a day the objection of *infamia facti* has not been entertained; and, therefore, even the admission that a witness was charged with an offence of which he was not convicted, could not, in consistency, ever have been received to his admissibility, however the circumstance might be taken to affect his credibility. But, observe farther, that in all these cases where the objection could occur, the person under trial had denied, not only his own guilt, but the *corpus delicti*; how, therefore, under such circumstances, he could competently allege as an objection to any witness, not only that he was his own associate in the commission of a crime with which he denied having any connection, but also that he had been engaged in the commission of a crime, the very existence of which he was disputing, I acknowledge I have been at a loss to discover.

I can very well understand that it might be a ground of objection to allege that the witness came into the box under promises of immunity from the public prosecutor, contingent upon the nature of the evidence which he was then to give. But that is an objection altogether separate and independent of that which I am at present considering; and to which I shall afterwards have occasion to address myself, when I come to that part of the question which refers to the powers of the public prosecutor, in selecting the parties to be tried, and those who should be taken as witnesses, as well as the effect of his adducing a *socius criminis* to give evidence in the trial of an offence. At present, it is sufficient, with reference to this part of the case, to submit it to be clearly established, from a train of practice running through a period of upwards of two centuries and a half, that *socii criminis* have been admissible witnesses in the law of Scotland; and, as was stated by Lord Eskgrove in the case of Downie, 'in every country which has a regular constitution and 'Government, *socii criminis* are admissible witnesses in trials 'for crimes, and in many cases justice could not be done, nor 'the greatest criminals convicted, without the aid of such 'evidence.'

This being the opinion I have formed as to the admissibility of an accomplice as a witness, I acknowledge that without

going farther, and without ever having recourse to the support of precedent, I should have presumed that at all times, and under all circumstances, the examination of a witness must have operated *ipso facto*, as an immunity to him from subsequent prosecution for the crime respecting which he was called upon to give evidence. In truth so irreconcilable to all sound reason would it be to hold, either that no such immunity was thereby obtained, or that there was not created an equitable right as in England, to a pardon, (of which last doctrine observe there is no appearance of there having been any existence in the law of Scotland), that I cannot imagine how any *socii criminis* ever could have been examined. No man is bound, upon any principle whatsoever, to give testimony against himself; and therefore, if no such immunity had arisen, the witnesses in all the cases that have occurred, in stead of giving evidence, must necessarily have been silent; and, at all events, so utterly destructive would the practice have been to the principles which have for upwards of 140 years regulated the admissibility of witnesses in this Court, that I am persuaded had the idea ever been entertained, that a person so made use of could afterwards himself have been prosecuted for the same offence, your Lordships would have found, that persons in that predicament, instead of being admitted, would have been uniformly rejected.

But, my Lords, the apparent and manifest expediency and justice of extending such immunity to accomplices, whose evidence has been employed with a view to the conviction of offenders, will not, of themselves, afford to your Lordships satisfactory grounds for determining how the rule came to be established; and this the more especially, as your Lordships are well aware that there are, by the law of this country, two classes of prosecutors, public and private, whose rights and privileges may be so materially encroached on by the exercise of the principle to which I am referring.

It does therefore appear of importance, that your Lordship should most particularly attend to the history and to the rights of these prosecutors, in order more distinctly to determine how a person made use of by the public as a witness, should, by that proceeding, be himself exempted from future question, for the offence respecting which he has been examined.

And here, my Lords, I have no occasion to dispute that there is, in the law of Scotland, as stated by Lord Gillies, a right in the private party immediately aggrieved by the commission of an offence, to pursue the perpetrator not only for re-

paration, but for the public punishment of the offender. Indeed, I entirely concur with his Lordship in what he stated upon that subject, and in the approbation he afforded to the passage respecting the rights of the private prosecutor, which he read from the treatise of Mr Burnet. Farther, I can have no hesitation in expressing my most earnest and anxious hope that the rights of private prosecution should ever continue, as by law established, to be a salutary control upon the public prosecutor, and to afford additional security for the rights and liberties of the people.

But my learned brother omitted to advert to this most material circumstance, as affecting the rights of the private prosecutor, that at all periods, and under all circumstances of the law of this country, his rights and his privileges have never been unlimited, but were even, in times the most remote, subject to the effectual control of this Court, or the Court of the High Justiciar which preceded it, and which at one time had the power of rendering them altogether nugatory and abortive, while prosecutions for the interest of the King, as representing the public, were regulated by different principles, and subjected to very different rules.

In order, however, fully to understand the different situations of private and public prosecutions, it humbly appears to me to be important, that your Lordships should keep in recollection the original constitution of this Court, or rather of the High Justice Court, in which the trial of all crimes anciently took place.

Your Lordships are aware, that it appears from many ancient statutes, that the Court in which the High Justiciar sat was, not only in theory, but in fact, the Court of the King; and that, in all proceedings, the Sovereign either was himself actually present, or held to be present. This appears from a statute of David II., passed in a Parliament held at Scone, by which it was ordained that the King should hold an 'Iter Justiciariæ per totum 'Regnum *in sua propria persona.*' To the same effect is a statute passed in the year 1488, and another in 1491, c. 10.; and again, by the act 1526, c. 7, it is ordained, that 'na Justice Aires be holdin na part, without *our Soverane Lord* and 'his Justice be present.'

Now, at this time, and for long after, your Lordships well know, that all public prosecutions were instituted by the authority of this Court; and so it is expressly laid down by Mr Hume, who states, 'That after information had been taken 'in the several counties, under the brieve of dittay, in the 'manner formerly detailed, the Lord Justice-Clerk, *at the* '*command of the Justiciar*, made up from those materials, what

'was then called the *Portious Roll and Traistis*; that is, a 'roll of the names of the delinquents, and a file of the suitable 'indictments against them. And with the same officer it lay 'to expede the necessary precepts towards the trial of those 'charges, and to issue his orders to the *Crowners*, (for we had 'this office formerly, though now long disused), to arrest the 'delinquents, and lay them inward, or take surety for their 'appearance. Now, in performing this service, whether with 'a view to the ordinary Justice Ayres, or to trial in particu-'lar diets at Edinburgh, the Justice-Clerk acted substan-'tially *for his Majesty's interest, and that of public justice and 'example.*'

When such was the form of proceeding, it is therefore obvious that there was vested in this Court a power, (and a power which was continually and perpetually exercised), of determining in all public prosecutions, which accused persons should stand in the situation of 'pannels,' and which (*socii criminis* being admissible) in the situation of witnesses. This power of selection, your Lordships will observe, was exercised either actually or virtually under the personal or implied orders of the Sovereign; and the necessary result of HIM who had the power of pardoning, selecting one individual for trial, and another to give evidence, must have been equal to the most express declaration, that while the one party should be tried in order to punishment, the other should go free. Accordingly, at this time, I find no appearance of actual remissions having been granted to persons adduced as witnesses, either as preliminary or subsequent to their giving evidence. And the case I formerly referred to, of Henderson, the *socius criminis* in the trial of Gowrie, confirms the supposition that none such was required; for there all that was done was, that Henderson's name was erased from the summons of treason, in order that he might give his evidence first against Cranstoun and Craigingelt, and then against Gowrie and the others, which he accordingly did, without obtaining any farther pardon or remission, than that which was implied by his having been received as a witness.

Now observe, my Lords, what at this time was the actual situation of a private prosecutor. He could not of his own authority commence any criminal prosecution, however great the injury he might have suffered, and call upon the Court of the Justiciar to try and punish the offender. That power was utterly denied him. The forms that were required to be observed, and which at that time, were effective and substantial, enabled this Court itself, and alone exercising the powers of a public

prosecutor, not merely to controul, but to extinguish the rights of the private party to prosecute criminally.

For your Lordships know well, that before the doors of the Court were opened to him at all, the private party was compelled to apply by bill of supplication to the Court, praying that they would ordain their officer to expede criminal letters under their own signet, as the fundamental step of the process. This did not then pass as mere matter of course, but *causa cognita*; and if the Court saw reason so to do, the supplication would unquestionably have been rejected.—From the different situations in which we thus find the private and public prosecutions placed, your Lordships are aware that there is a distinction in our practice between indictments and criminal letters,—the one form being alone available to the public prosecutor, who can raise it by his own authority alone, and the other competent to the private, who can do so merely when permitted by your Lordships.

Now, when such was the form of proceeding, is it possible to doubt, that if the Court, acting under the special orders of the Sovereign, had, either in the preparation of the process, or in the actual trial ordered to be brought by itself, given either an express or virtual and implied promise of immunity to a *socius criminis*, it would have sanctioned that very individual being brought to trial, when that sanction it was empowered to withhold? On the contrary, is it not to be inferred that it would, upon a supplication for trial being offered by a private party, have at once refused to grant warrant for criminal letters, thereby extinguishing at once, and for ever, all power in that private party, in so far as the question of punishment was concerned, the right of subjecting the person to whom the King, through them, had promised exemption from the risk and trouble of a public trial.

In order to make myself clearly understood, let it be supposed that at the time I speak of, the case now under consideration had occurred; that Burke had been 'dilaited' by orders of the Court, and put upon his trial; while Hare, under a promise from the King, acting by the Justiciar and his officers, had been made use of in the manner which we know, and which the Lord Advocate admits he made use of him on this occasion; must not your Lordships be satisfied, that if the present incarcerator had come forward with a bill praying for criminal letters to issue against Hare, the Court, by every principle of justice and fair dealing, was bound to have rejected that supplication, and dismissed the complaint? And THAT, most assuredly, it must be presumed they would have done.

Whether the case can be treated in a different manner *now*, and under our present form of procedure, is next to be considered.

And in this inquiry it is necessary that your Lordships should attend to the origin of the great and important change which took place in these forms, and how, and to what extent, the duties, which had hitherto been exercised nominally by the Justice-Clerk, but effectually under the direction of the Court itself, came to be transferred to his Majesty's Advocate, who had hitherto only appeared as counsel for the pursuer, that was, for the King and the public. This change seems to have been effected soon after the statutes 1579, chap. 78, and 1587, chap. 77, were passed; the latter of which directed, that the Advocate and Treasurer 'should perseu slaughters and 'otheres crimes, althocht the partys be silent or wald utherways 'privily agree.' These statutes, as well as the utter incongruity of the Court being at one and the same time prosecutor and judge, produced the effect of vesting in the office of Lord Advocate, those powers generally, which had formerly belonged to, and been exercised in the name and on behalf of the King through the medium of the officer of his own Court. No limitation in the transference of these powers, in any respect, was made, as far as appears, either from practice or statute; and your Lordships will infer that, if certain powers were necessary for explicating the functions of prosecutor when vested in the Court, the same must necessarily have been transferred to the Lord Advocate, who was thereafter to discharge the same duty to a similar effect, on behalf of the Sovereign and the public. Accordingly, it is not a little curious to observe how completely this appears to be confirmed by the subsequent practice of the Court.

Previously to the power of prosecution being transferred from the Justice-Clerk, it was obviously impossible for private parties to compel, either the Court or its officers, to 'dilait' or indict any offender. Their remedy was that which I have before pointed out, of applying for criminal letters. Accordingly, your Lordships find that after the Lord Advocate came to be public prosecutor, in no case was it ever held that he could be required to afford 'his instance' to the private party. Neither could the Court be called upon to interpose their authority, to the effect of compelling the Advocate to adopt that measure; for had such a power been reserved to the Court, when the right of instituting prosecutions, through the medium of the Justice-Clerk, was abolished, it would, in effect, have been to have retained the right which they possessed before, and of which it was

the policy of the law to discharge them, of determining in each case, what prosecution should be raised, or what abandoned. But while the right of the Advocate, who had become the public prosecutor, was thus left in the same situation as that in which it had been possessed by the officer who had preceded him in the discharge of the function under the direction of the Court, the right of the private prosecutor was left in no worse condition than it had been before. Previously, he had to prefer his complaint, in the first instance, to the Court, which, *causa cognita*, granted or refused his supplication for criminal letters; but this, too, was obviously an incongrous right to be exercised by the judges who were to try the case, when it could possibly be avoided; and, therefore, the power of judging, in the first instance, whether the criminal letters ought to issue, was transferred to the public prosecutor. Hence, we find that the concourse of his Majesty's Advocate came to be required as a necessary adjunct to every supplication, before the Court could be called upon to grant the warrant for criminal letters, the fundamental step of the process.

But as the granting or refusing the prayer for criminal letters, had always been a judicial, and not an arbitrary or a ministerial act, so the Court retained the power upon cause shewn, of compelling the prosecutor to grant his concourse. This appears accordingly to have been the opinion of Lord Alemore, in the case of Gordon, referred to in the papers, when he said, that if the prosecutor had refused to grant his concourse, he '*might*' have been compelled to have given it. The controul of the public prosecutor, in the *fundamental stage* of the proceedings, over the right of the private, (subject, however, to the power of this Court,) is therefore undeniable. But farther still, and in like manner, we find, that in all stages of the cause, the Lord Advocate has uniformly exercised the right of controling the private party, in every thing in which punishment was concerned. This, your Lordships will find, by examining the form of the letters of slaines, as given in Kaimes, from which it appears, that while the private party could effectually bind himself to the accused, that he should never 'be called, persewed, be way of deed or otherwise,' he could not discharge him from the risk of a prosecution at the instance of the public prosecutor; and that he was therefore obliged to conclude with a humble application to the Crown, to grant a pardon and remission. And the same thing appears again, from the power of restricting the libel, which, your Lordships are aware, has always been competent for the public prosecutor, at any time before the return of a verdict, (though it is only within a few years that the right of doing so,

after the return of the verdict, has been acknowledged,) while this right never was believed to have belonged to a private prosecutor. Accordingly, the distinction and the power of control I am speaking of, is well pointed out, in a case referred to by Burnet; although I find from the record, that it is both misstated and misunderstood by that author. He says,—'Nay, 'we find that even the power of restricting to an arbitrary 'punishment, belongs to, and has been frequently exercised 'by, the private party; and so it was found in the case of Glen 'v. Hunter, 20th Dec. 1725.' Now, on looking to the record, I find that Mr Burnet has omitted a most important part of the procedure; of which the following is an accurate account:—The prosecution was raised at the instance of Mr James Glen, advocate and Provost of Linlithgow, for the crimes of riot and mobbing, &c., and on the act 1 Geo. I. entituled, an act to prevent tumults, &c., the contravention of which, in the particulars stated, inferred a capital punishment. In the course of the proceedings, the following minute appears:—'Mr James Glen of Longcroft, Provost of Linlithgow, private pursuer, judicially consents to the restricting that part of the lybel, in relation to the act of Parliament, *Primo Georgii*, anent the letting and hindering the reading the proclamation against mobs and ryotts, to an arbitrary punishment.'

(Signed) 'JAMES GLEN.'

'His Majesty's Advocate-depute; In respect the private 'pursuer has restricted the lybel to an arbitrary punishment, 'and that he has no reason to believe facts can be proved against the forenamed pannels, to infer the punishment of the 'act *Primo Georgii* lybelled, entituled, an act to prevent tumults, &c.; but from the information of the private pursuer, 'he judicially consents to the restriction of the same.'

(Signed) 'CHARLES ERSKINE.'

'The Lord Justice-Clerk, and Commissioners of Justiciary, 'in respect of the above consents of the private pursuer, and 'Advocate-depute, restrict the libel upon the above mentioned act of Parliament, to an arbitrary punishment.'

From this, it is manifest, that it was held that the public prosecutor, though only giving his concourse, had a control of the proceeding in the trial, at the instance of the private party; and that his consent, as in this case, was deemed indispensible to carrying into effect the motion of restriction, even of the *dominus litis*.

The only one case which has been, or I believe can be quot-

ed in opposition to this doctrine, is that of Colonel Charteris, mentioned in the argument for the parties, in which, after the Lord Advocate had stated his wish to withdraw his concourse, the private party was allowed to go on with the prosecution of the libel, and actually succeeded in obtaining a verdict; but this proceeding cannot, I think, be held to affect my view of the question in any particular; for, in the *first* place, the indictment was laid upon a special statute, so framed as to have rendered the concourse of the public prosecutor altogether unnecessary even in the fundamental stage of the process; and that under it, the bill for criminal letters might competently have been presented to your Lordships' predecessors, and the warrant for them granted without that form being required. But, in the *second* place, it was quite absurd to attempt to withdraw the concourse after the case was in Court. The concourse must be given to the first *step* of the process, and before the case was in Court,—its object, your Lordships know, being to prove that the public prosecutor had *considered the bill*, and not only held it to be a case for the entrance of which the doors of the Court should be opened; but, also, that he had been placed in a situation to watch over its progress and its issue. But after the signet of the Court had moved,—the criminal letters had been issued,—judicial proceedings had commenced,—and issue had been joined,—it was obviously as irregular and as incompetent for him to attempt to put an end to the suit, as it would have been, in the original form of procedure in this Court, for the Justiciar, after having issued his *fiat* for raising criminal letters under his signet, to have stopped the proceeding before himself, by ordering that *fiat* to be cancelled.

From all this, I apprehend, that there is not only no reason for doubting, but, on the contrary, it is established, that in so far as powers of prosecution were concerned, the Lord Advocate came in the place of the Justice Court and its officers, and that he was necessarily vested, and has been held to have been vested, with all the powers which were possessed by those who preceded him, and which, in fact, were indispensibly necessary for the effectual and beneficial exercise of that part of his official function. Among these, the most important was the power to fix upon the persons who should be subjected to trial, and upon those who should be examined to establish the offence. Yet without the power of securing the latter against farther question and hazard, the right of selection itself must have been altogether ineffectual and nugatory. Accordingly, without going farther back, this power your Lordships will find to be fully acknowledged in the deliverance of the Court in the case of Smith and Brodie, following upon the minute of his Majesty's

Advocate, as well as in the judgment of their Lordships referred to by Lord Pitmilly. Again, it was recognised in the judgments of the Court in the case of Downie in 1794, and of James Spiers in the year 1820, which merit more particular attention.

In the former of those cases, which has been already referred to, your Lordships will find, that Lord President Campbell, in the very outset of his judgment, expressly recognises this power. 'It sometimes happens,' says his Lordship, 'that 'witnesses are adduced to give evidence upon facts of a criminal nature, between parties *who have no authority or power 'to discharge the prosecution before a Court of criminal jurisdiction*, if any such shall arise out of the facts thus meant to be 'given in evidence. In such a case, and where the question 'put tends to draw an answer which may criminate the witness himself, I understand it to be the duty of the Judge to 'give notice to the witness that he is at liberty to decline making an answer to the question, on account of the effect which 'it may have against himself; not that the answer, if made, 'could be used as evidence elsewhere, but that it might lay a 'foundation for his being prosecuted, by giving information of 'his own guilt.—But, with respect to the proceedings in 'Courts of criminal jurisdiction, which I had occasion to be 'well acquainted with, as public prosecutor for several years, 'I know that it is common, and often necessary, to admit accomplices to the crime as witnesses against the prisoner, 'otherwise crimes would too often go unpunished. But I always understood it to be a settled rule, that his Majesty's 'Advocate, prosecuting for the King, could not, after making 'such use of an accomplice, or *socius criminis*, bring the witness himself to trial for the same crime.'

Now, in the first part of the above passage, the Lord President obviously recognises a power in some one, to discharge a criminal prosecution, and this could only be the public prosecutor; for your Lordships are not to be told, that no such power was ever acknowledged to reside in any private party whatsoever, whose power is entirely limited to extinguishing his own private right of prosecution. To the same effect is the judgment of Lord Chief Baron Montgomery, and of Lord Eskgrove. No doubt their Lordships more particularly refer to the case of persons examined as witnesses in Court. But it was then the case of a witness who was offered to be examined in Court that was before them, and of course their attention and their observations were necessarily more directed to that precise position of the party than to any other.

But observe, my Lords, what was actually done in that case.

The law of England, we are informed, holds that an examination in Court, does not *ipso facto* exempt a witness from trial. The case of Downie, however, was brought under the law of England and its proceedings, and their effects could not be regulated by any other principles than those recognized in that law; and therefore, the witness ought, if immunity could not be secured to him, to have been fairly warned, and assuredly could have been so warned, of the predicament in which he stood, and been informed that he was not bound to speak out or to say any thing to criminate himself. But no such thing took place; on the contrary, the Lord Advocate, (Dundas), came forward and stated, that, 'the present witness 'Aitcheson, being a Scotchman, and residing within the 'county of Edinburgh, he can only be tried in this county, 'and by a jury of this county; *as public prosecutor for Scot-* '*land, I explicitly declare in this Court, that it is not my inten-* '*tion, and I never will bring Aitcheson to trial for any accession* '*to the crime of treason charged against this prisoner, so far as* '*the witness may have been accessory to it, previous to this trial.*' Upon this assurance, and without any other protection whatsoever than this bare promise of immunity given him by the public prosecutor, the witness is put into the box, sworn to speak the truth, and the whole truth, and examined as to matters by which he would have been himself inculpated in the crime of treason, and for which he would have been liable to prosecution by the law of England, except for the security which the promise of the public prosecutor afforded him.

Now, my Lords, I apprehend it to be quite impossible to figure any case recognising in a more authoritative manner, the unlimited power of the public prosecutor to stipulate for immunity from punishment, in consideration of a *socius criminis* agreeing to give evidence. For the immunity here acknowledged, must have been altogether independent of the examination in Court, as by the law under which he was to be examined all such effects of examination were rejected.—It rested entirely upon the power of the public prosecutor to give it, which if the Court did not hold it to be clear and undoubted, he had the power to do, their allowance for putting Aitcheson into the box, without warning of any kind, would have been an act of the most gross and intolerable unfairness and oppression. And, accordingly, my Lord, we find that the same thing again took place before the last Commission of Oyer and Terminer, in the case of Spiers. In that case, a person of the name of John Fraser, being called as a witness, stated, before being sworn, that he had been imprisoned for four months upon a charge of treason, and that he wished to 'know whether I appear

'here as a principal or a witness. I do not know that I may 'not yet be brought to trial.' After this statement, some discussion took place upon the liability of a witness to trial after being examined in Court, during which, the Lord Justice-Clerk stated, 'At Dumbarton it was said by the Lord President, that on no account could the public prosecutor prosecute any individual he brought into the box as a witness.'

Some doubt seems to have been expressed of this doctrine, as applicable to a trial depending on the principles of the law of England; but the Lord Advocate having followed the course which had been pointed out and adopted by his predecessor, and given an assurance that there was no intention to try the witness, Fraser was called, and the Lord Chief Baron Shepherd, than whom there can be no higher authority, either in a matter of law or of fair dealing, and who I am sure would rather have laid down life than have willingly or even incautiously misled the person to whom he was addressing himself, on that or any other occasion, informed him.—'You 'understand you are brought here as a witness, and that you 'are to speak the truth, THE WHOLE TRUTH, and nothing but 'the truth.'

Upon this, it appears that the witness put the question, 'And that I am not to be considered as a principal any longer?' to which Mr Hope, Advocate-Depute, replied, '*certainly not*;' and in the same emphatic terms, the Lord Chief Baron rejoined, 'CERTAINLY NOT.' Here then again, your Lordships have a second instance of a witness being fully assured of immunity from all risk of criminal prosecution by the highest authority in the law, and by solemn judgment given in one of the most important cases that could occur, upon no other authority than the promise of the public prosecutor, thereby recognising his power to give complete assurance to a *socius criminis*, who would not have been exempted from the risk of trial by the mere fact of his having been examined as a witness, that he could no longer be subjected to prosecution.

In opposition to all this weight of authority, more than I almost recollect to have seen bearing uniformly, and without interruption, in one direction, and to one conclusion, there can be nothing, as far as I have been able to see, brought forward, but arguments deduced from analogy and inference; *first*, from the fact, that occasionally remissions from the Crown itself having been granted to witnesses before examination, the right of granting immunity to *socii criminis*, cannot be held to have resided in any other quarter;—*secondly*, from the undoubted fact, that the principle of the law of England only recogni-

as such a power to reside in the Sovereign;—and, *thirdly*, from the supposed declaration of the Legislature upon this subject, to be gathered from the provisions of the statute of the 21st Geo. II. cap. 34, it is to be presumed, that, at common law, a *socius criminis* could not, by any act on the part of the prosecutor, be protected against subsequent accusation.

The inference to be drawn from the first of these three considerations, seems, however, by no means to follow from the fact which is admitted; for your Lordships will recollect, that remissions in favour of persons who were called as witnesses were not, at least in general, required, till after a period when, by the infamous and profligate conduct of those by whom Scotland was governed immediately before the Revolution, all confidence in public men was utterly destroyed, and no one could reasonably have relied upon an assurance from any of the King's servants, or upon any thing short of a recognition of their immunity under the Royal signature. In fact, if I recollect rightly, remissions of this description do not appear till the period when, not only to the eternal infamy of themselves, (which would have been nothing), but to the dishonour of the country to which they belonged, and which had the disgrace of submitting to their rule, Lauderdale and Rothes, and others of high name, had, in the face of this Court and of the world, pledged themselves, upon their solemn oaths, to a deliberate and downright falsehood, for the wretched and miserable object of obtaining the ruin and the death of a covenanting clergyman, (Mitchell, if I forget not, he was called,) to whom, in the name of their Sovereign, they had promised mercy. Who, during such times, can be expected to have ventured upon a confession, on the bare assurance of immunity from the public prosecutor, himself subordinate to the perjured miscreants I have mentioned? Or how can the fact of men, placed in such predicaments, requiring the hand and seal of the King to secure their safety, be alleged as affording evidence in opposition to the inveterate practice of an opposite description, to which I have called the attention of the Court?

Secondly, with respect to the analogy drawn from the law of England, I shall say nothing farther, than that it has never been considered as of authority in this Court; and even if it were directly opposed to the views I have taken, I should not think myself entitled to place any reliance upon it, in forming my judgment at present. But, *secondly*, as it seems to me, the provisions of that law upon this subject are opposed to our own, more in appearance than in fact,—both equally effecting the same result, by different means;—and, *thirdly*, it is perhaps possible, that the very circumstance of cri-

minal prosecutions being there generally conducted, at the suit of the private party, may have led to the establishment of the principle, that the employment of the *socius criminis* as a witness did not, *ipso facto*, confer upon him an immunity,—just in the same way a private prosecutor, with us, is without that power, except in the special case provided for by the statute of George II., to which I have now to call the attention of your Lordships.

With respect, then, to the inference which has been drawn from that statute, I shall content myself with observing, in the *first* place, that concurring in the views respecting its enactments, so luminously laid down by Lord Pitmilly, in so far as they went, I shall not venture to repeat any part of what was so well stated by his Lordship;—but, *secondly*, I must observe, further, that the provisions of that statute seem to me altogether to refer to the case of a *socius criminis*, examined in a prosecution raised at the suit of the private party, who, it has never been pretended, could, at common law, give any assurance of indemnity to his witness, and whom I think it was the policy of that act to induce to prosecute. Indeed, unless I have utterly misunderstood the whole of the authorities to which I have referred, it is impossible for me, upon any just principle of interpretation, to put a different construction upon this statute;—for if either the examination in Court, or the assurance of the public prosecutor, was sufficient to secure the *socius criminis* against subsequent prosecution, then the same rule was applicable to the cases contemplated in that statute as to all others, and, of course, the enactment was superfluous and unnecessary, which cannot justly be presumed.

Accordingly, in confirmation of this view of the statute, your Lordships will find, that in none of the many cases in which the objection to *socii criminis* has been urged in a prosecution *at the instance* of the Lord Advocate, since it was passed, has this statute ever been referred to, either at the Bar or on the Bench, as having any connection, directly or indirectly, with the general principle; although it is quite clear, that if the opinion upon this subject expressed by my learned Brother, Lord Gillies, is correct, it is hardly possible to suppose that it would have escaped the attention of those personages of consummate ability by whom the objection was urged, or of those by whom it was repelled. Nay, your Lordships will observe, that although, as appears from the Treatise of Erskine, that the statute had not escaped the knowledge of the Bar at the time, when the case of Jameson occurred, in the year 1770, it is not once mentioned, from the beginning to the end of the long argument, which it appears from the record of the Court was then maintained.

I shall take leave of the whole of this part of the subject, therefore, by merely observing, that no stronger proof could be adduced in support of the views I have had the honour of submitting to your Lordships, than the fact that, in the whole history of the criminal law of this country, there is not one instance to be found, in which a person who has either been examined in open Court, from which an obligation of immunity, upon the part of the public prosecutor, was to be implied, or who could allege that he had received, in return for his making an ample confession of his participation in the crime, a positive assurance to the same effect, ever having once been brought to trial before your Lordships, or your predecessors.

In holding, therefore, that the public prosecutor has the right of selecting his witnesses, and either in the course of a precognition, or by an examination in this Court, granting them security from future punishment, in consideration of their enabling him to prosecute with effect other and more flagrant delinquents, I confidently reject the imputation of either creating a new law, or stretching from analogy an old one. In no case have I ever considered myself as entitled so to do, and far less in the exercise of my duties in this Court, where the lives and the liberties of the subject are so immediately involved in the judgments of your Lordships, and where I must ever think you are imperatively required to act upon fixed, established, and recognized principles.

At the same time, it does not appear to me, upon the other hand, that I have any right to regulate my opinion by those views of policy and expediency which have been so broadly taken, and so strongly relied upon, even were I perfectly satisfied, (which I certainly am not), that there are not substantial grounds for questioning their accuracy and justice. Being quite clear, that, for centuries, the right in question has belonged to the office of public prosecutor, I certainly should not feel myself entitled, upon views of that description, to stretch forth my hand to abridge it. But, indeed, when I consider the indispensable necessity that there often is for an immediate investigation into crimes,—the perpetrators of which might remain concealed and go unpunished, if a power such as this did not reside in those entrusted in behalf of the public, with the duty of bringing offences to trial,—I must have the greatest doubt, if, from a speculation into fanciful and far-fetched cases, which, in all human probability, can never occur, it would not be dangerous to encroach upon a power which, as far as I have discovered, has never been abused, or alleged to have been abused, even in the worst of times.

Should the period, however, arrive, when the high public officer in question shall be guilty of prostituting his office, in the manner supposed, for the sake of granting an indemnity where it ought not to have been conferred, your Lordships are aware, that as the process of assythment, which he cannot discharge, would secure publicity to the act, equal to the most open proceeding in this Court, he would be as much exposed to a complaint to the King and Council, or impeachment in the Parliament of the kingdom, as if the witness had been brought forward and examined in open Court, which it is allowed, upon all hands, would now secure him an immunity.

Upon the whole, therefore, I trust that I have satisfied your Lordships that there is sufficient evidence, that *socii criminis* were at all times admitted as evidence in the law of Scotland. *Secondly*, that the ancient forms of proceeding enabled those originally intrusted with the power of raising prosecutions in behalf of the public, to select the parties to be tried, and the parties to be made witnesses, and to secure to the latter complete fulfilment of any promise of indemnity they might find it necessary to make them. *Thirdly*, That this power being exercised by the Court through the controul over the private prosecutor, which it possessed, came, under different forms, to be transferred to the public prosecutor, when he acquired the right to which I have referred. And, *lastly*, That while this is proved by the whole tenor of our practice invariably exhibiting one clear and uniform principle to that effect, —the right has been confirmed by judgments and precedents, following each other in an uninterrupted series, during a long period of years.

In this situation, it is unnecessary for me to enter particularly, or at length, into what occurred at the trial of Burke, with respect to the present complainer, because I am most clearly of opinion, that had the latter never been examined upon Burke's trial, yet, after the admission made by the public prosecutor, that upon 'an assurance, that if he would disclose the facts relative to the case of Docherty, and to such other crimes of a similar nature committed by Burke, of which he was cognizant, he should not be brought to trial on account of his accession to any of those crimes,' he emitted a full declaration of all that he knew, it was quite impossible for your Lordships to have allowed him to be put upon his trial at the suit of any prosecutor whatever. At the same time, I am free to acknowledge, that had Hare not been examined as a witness on the trial, but had only been cited and put in the list of witnesses, *and had not come forward and alleged that any such promise had been given him as that admitted by the public*

prosecutor, I should never have held that either the public or private prosecutor was barred from putting him on his trial. It was upon a consideration of the whole facts taken together, as they occurred upon that trial, viz.—upon the three cases being included in one indictment,—upon the *socii criminis* being cited to give evidence upon the whole of them,—upon the avowal of the Lord Advocate that his wish was to go on with the trial of all three,—and upon their subsequent examination, without any application from the public prosecutor to put them upon their guard, that they were only called to give evidence respecting one of the offences, and might still be made responsible for the others,—that I held that a promise of immunity given by a party, according to Sir Ilay Campbell, 'who had au-'thority and power to discharge the prosecution,' was to be implied, by which the public prosecutor, and all others, were to be barred from afterwards putting the life of the complainer or his wife in hazard, for any thing done concerning these proceedings. Accordingly, my Lords, it was upon this principle, and without hesitation, that I concurred in its being laid down to the Jury, as our decided opinion, 'that whatever might be the 'case with regard to other murders, or other crimes, the witness-'es in question are as fully protected by the law in relation to 'all those contained in the present indictment,—that is to say, 'against either trial or punishment for them, as if they had 'been entirely free from any concern in their perpetration.'

To that opinion I still most firmly adhere, and it has been utterly beyond my power to discover any inconsistency whatsoever betwixt that direction in point of law, and any thing else that occurred upon the trial, as the same appears from the printed account of it, which I am bound to say gives, according to my recollection, a fair and sufficiently accurate representation of the proceedings. The opposite opinion I suspect, is entirely founded upon a mistake as to the nature and extent of the question, which it was thought legal by the majority of the Court to put to the witness, provided that he was duly warned of his being under no obligation to answer it. But that question, your Lordships will find, related not to the murder of Wilson, or the murder of Paterson, the two other murders mentioned in the indictment, besides the murder of Docherty, but to murders generally, on account of which we had no evidence, from which we could infer any assurance of immunity against being tried, either express or implied, and from which his examination could, upon any principle, protect him. On the whole, therefore, I am clear, that this warrant ought to be discharged, and the complainer ordained to be set at liberty.

It is with the utmost regret that I have felt myself obliged to detain your Lordships at so very great length, but the importance of the question, and the principles on which my opinion rested, called upon me to state fully the view I have taken of the case.

And even now I cannot conclude, without joining with both my brethren, in paying my tribute of approbation to the manner in which this case has been argued, upon both sides of the Bar. I have seldom seen equal talent displayed, and I have never had occasion to witness more patient or profound investigation into any case, that has been here submitted for our judgment. In fact, this feeling operated so strongly on my own mind, that being compelled to differ from my learned friends at the Bar, as to the justice of some of those admissions, which, upon both sides, they thought it incumbent upon them to make, confidence in my own opinion was considerably shaken; and it was not, till after repeatedly considering the subject, and finding that I was as often confirmed in my opinions, that I deemed it to be my sacred duty to deliver this judgment to your Lordships.

With respect, again, to the conduct of the public prosecutor, in so far as it relates to the investigation of these deplorable and atrocious proceedings, it is quite unnecessary for me, after what has fallen from both my brethren, (and in whose opinion all of your Lordships, I am confident, concur,) to say more than this, that there is no one who will divest himself of prejudice and passion,—no one who will consider how infinitely important it was, that at least one conviction should be obtained, on account of these barbarous murders,—no one who will calmly peruse the evidence given in the case of Burke and M'Dougal, and remember that after all, that wretched woman was acquitted by the Jury, who will not be entirely satisfied, that the conduct of the public prosecutor has been throughout, as completely regulated, not only by a full sense of the duty he owed to the public, but by sound discrimination and judgment, as in the proceedings now before your Lordships, it has exhibited the most perfect decision, dignity, and fairness.

Lord Mackenzie.—As was to be expected, great part of what I had noted as the grounds of my opinion, has been anticipated. But I think it better to run the risk of being tedious, by some repetition, than not to express myself fully and explicitly in a case of this nature.

I think this case is sufficiently before us. The complainer having been apprehended, on a warrant by the Sheriff, for the mur-

der of James Wilson, and a precognition, under the Sheriff's authority, having been ordered relative to that murder, presented a petition for liberation, and for stopping that precognition, on the ground that he held a legal protection from all prosecution for that crime. This being refused by the Sheriff, he has brought the case here, by advocation; and at the same time, in due form, craved suspension and liberation. I think this entitles him competently to our judgment, in the same way as if he had, under similar procedure, pleaded a previous pardon, or indemnity by statute, or a previous acquittal. If he can make out his case, there seems no doubt that we can competently, and are bound to order his liberation, and discharge further criminal procedure against him for this matter,—*i. e.* all the procedure which is the subject of this advocation and suspension.—A difficulty has been raised as to the respondents' claim for assythment. I do not see how that applies. The claim of assythment is of a civil nature. It cannot authorize apprehension of the party upon whom it lies, or the taking of a precognition criminally, under the Sheriff's authority. Nor is it mentioned in these proceedings, which are simply criminal, and insisted on with a view to punishment only, without any claim for assythment, or for security to pay assythment. If, then, we are satisfied that the party is not liable to any punishment, but protected legally from any criminal prosecution, we must, I think, grant what is prayed for in this application.

My Lords, I consider this a question of great importance, not to the public only, but to the complainer. I am not relieved from this feeling, by the possibility or probability of a pardon, in case Hare should be prosecuted and condemned. It is enough to say that he pleads this protection, to save him from the danger of a capital sentence. The chance of a pardon is no answer to him, any more than it is an answer to any man who defends his life in this Court. Any pannel may be pardoned, if his defence be overcome; and the better his defence, the better his chance of pardon. But that cannot hinder his right of calling for your Lordships' judgment, as fairly, nay as favourably, as if, on condemnation, he were instantly to be led from the Bar to the gallows.

The question then is, whether he has a sufficient protection to entitle him to such judgment in his favour?

This question seems to me to resolve into three points:—

I. The *first* is, whether, in the law of Scotland, there be any right of protection existing in favour of persons who have been called, and brought into Court as witnesses by his Ma-

jesty's Advocate? If there be no such right, then it follows that this man Hare is still liable to be prosecuted, by his Majesty's Advocate, not only for the murder of James Wilson, but for that of Docherty, notwithstanding all that took place at the trial of Burke for that murder. I have not, however, heard that maintained. The argument for the respondents was not, I think, carried so far. And when I consider the practice of this Court, I am not surprised that this was not argued. What had been the practice anciently, does not appear with certainty. This only seems pretty certain, from the expressions of Sir James Stewart, who was eighteen years Lord Advocate, in the reigns of King William and Queen Anne, that in these reigns the practice of calling *socii criminis* as witnesses, under some form of indemnity, existed. And there can be little doubt but that the practice of calling *socii criminis*, under some form of indemnity, continued to prevail. It is also sufficiently clear, that, at least previous to the noted trial of Brodie and Smith, the opinion had come to be entertained, that the King's Advocate, by the very act of calling a *socius criminis* into Court as a witness, did give him an implied assurance of protection, which the Courts were bound, in fair procedure, to enforce in his favour. Accordingly, in that case,—a case of much celebrity,—a trial of two men, one of them a man previously in a respectable rank of life, for house-breaking, a capital case in law, and so insisted in,—two accomplices, Ainslie and Brown, were admitted as witnesses; it being, at the same time, expressly stated by the Court, that they had thereby an immunity from prosecution. I cannot doubt such were the proceedings in that case. The printed reports were not only published at the time, one of them by a juryman, who could not possibly be mistaken on this point, to which the attention of the jury must have been particularly called, but they are referred to by Mr Hume, who must have written, if not at the time, yet not long after; for the first part of his commentaries on criminal law was published in 1797, only nine years after. The record of Court, too, though it does not contain the words of the Lord Justice-Clerk, yet does contain the argument of the Lord Advocate, implying the same doctrine. In the same case, Sir Ilay Campbell was Lord Advocate, Erskine and Wight were counsel for the pannels, and Macqueen, Lord Justice-Clerk, with four other Judges present, two of them being Lords Eskgrove and Hailes. Though we may not now be able to explain the precise grounds on which the opinion of the Court was founded, he must have more self-confidence than I can venture to assume, who will say, that amongst such men, the opinion was adopted without grounds

at all, or without tenable grounds. This solemn decision, in a celebrated case, was fully acted upon. Brodie and Smith were convicted and executed. Brown and Ainslie, the *socii*, remained free from prosecution, for any matter contained in that indictment. This was in the year 1788. It was followed by a constant, uninterrupted, uncontradicted, incessant, and most numerous, as well as most important and notorious series of similar proceedings, in conformity to that case, extending from the date of it down to the present day. I know not, nor believe, that in any one instance where the Lord Advocate has thought that taking an accomplice as King's evidence, was an expedient measure, he has ever been prevented from doing so by the state of the law, or that it was ever done without an explanation from the Court, that an immunity from prosecution was the consequence, or without actual enjoyment of that immunity following. In one trial for treason, a proceeding under the law of England, some discussion seems to have taken place, as to the possible effect of the *socius*, when called as a witness, refusing to give evidence. There is certainly an opinion there expressed, that if the *socius* refused to give evidence, he lost his protection. And why not? Refusal to give evidence would evidently be, in substance, equal to a refusal to appear as a witness. It would be a breach of the condition on which remissions had been, and the indemnity in our practice was granted, *i. e.* that the *socius* should be a witness. I cannot see that the opinions in that case go farther. And it is particularly worthy of observation, that neither the Lord Justice-Clerk, nor any Judge, says, that the report generally received of the case of Brodie was erroneous. I cannot see that there was any thing like a decision, or even expression, contradictory to the tenor of the practice of the Court. Accordingly, the nature of that practice is stated by Mr Hume, who published, as I have already observed, in 1797, not long after the date of that case, and who says:—'A *socius criminis*, (so it is now 'held), though not so creditable a witness as one who is 'liable to no such imputation, still cannot be more infamous 'in *jure*, with relation to this than any other trial; and in 'all other trials, he is a lawful witness, since he has not had 'any mark of infamy impressed on him by the sentence of a 'Court of law. The risk of bias also, from his fear of the 'prosecutor, is obviated, if it shall be held, which is now the 'established opinion, and was delivered for law from the 'Bench, in the noted case of Smith and Brodie, that, by the 'very act of calling him as a witness, the prosecuter discharges 'all title to molest him for the future, with relation to the 'matter libelled. Thus, the witness, when this has been ex-

'plained to him, is absolutely free to tell what story he has a 'mind.' But it is quite needless to appeal to any law-writers on such a subject. Your Lordship has sat in this Court now no small number of years, and most of the other Judges, either in that or other capacities, have had pretty long acquaintance with its practice. I would ask, whether any one of your Lordships ever saw one case, where a *socius criminis*, thought by the Lord Advocate a necessary witness, was not called and admitted; or where a witness, known to be a *socius criminis*, was brought forward, who was not admitted upon an explanation of his consequent indemnity? Not one of the forty years since Brodie's case, I am confident, has passed, without judicial recognition of this rule of law in important cases. And as this practice has been uncontradicted here, so has it been unchallenged and unaltered by Parliament. It has always been quite public, and highly important,—perfectly known to Parliament, but never by Parliament changed or censured. Some cases of great importance, I allude particularly to trials for sedition, were the subject of much attention in Parliament, from the opposite views of them taken by our great parties at the time. But nothing was done in disapproval of this part of the procedure, though in these trials, *socii criminis* had been admitted, (as Mr Hume notices,) in conformity to the usual practice. In short, if it be possible, by a tract of judicial practice, to establish any thing, I think this point is established. And, therefore, I think that it is altogether out of our power to hesitate in holding that Hare has a protection.

II. The *second* point is, whether the immunity from prosecution acquired by *socii criminis*, produced as witnesses by the Lord Advocate, affects the private party, having originally, under the law of Scotland, right of prosecuting for the crimes which the Lord Advocate is barred from prosecuting? Now again, on this point, I must observe, that if it be determined in the negative, then Hare is still liable to be prosecuted, not only for the murder of Wilson, but for that of Docherty. For no doubt, she, as well as the poor creature Wilson, must have relations, some of whom would zealously come forward, or at any rate might be found out, and by encouragement, be brought forward to lend their names to a prosecution. In this way then, it seems impossible for the respondents, if they maintain the negative in this question, to avoid contending that Hare, after giving, upon public and solemn assurance of indemnity, that evidence, on which most materially the murder of Docherty was proved to have been committed, and Burke was convicted, might next day have been prosecuted himself,

for the very share in that crime to which, as King's evidence, he had sworn. Nay, this is not all. For if the indemnity of the witness is against the King's Advocate only, not against the private prosecutor, then there seems to be no reason why he should be protected in the question with that private prosecutor even, from the operation against himself, of the very evidence given by him. For the one has always accompanied the other, and rests upon the same foundation. Is it to be said then, not only that Hare, after giving his evidence for the Crown, in the trial of Burke, for the murder of Docherty, might have been that very day served with criminal letters for his share in this murder, but have had that murder, and his own share in it established, by his own words as a witness being proved against him, and that no other witnesses would have been necessary to convict him, than a competent number of the Jury who tried Burke, or of the Judges who heard the evidence in that trial? I must own my mind recoils from such a supposition, from the very idea of such judicial treachery. And yet, I see not how it can be avoided, unless we admit that the protection of a *socius criminis*, obtained by his appearance as a witness, in a prosecution by the Lord Advocate, operates also against the private prosecutor. But in truth, I think it very clear, that this must be admitted. For it appears not contrary, but agreeable to the analogy of our law. It is true, that by the law of Scotland, there is a right of private, as well as public prosecution for crimes, and that not for reparation only, but for punishment,—a right of which I rather think the Information for Hare speaks too lightly. But then it is just equally true, that unless the private party, having title to prosecute, come forward in time to prevent it, the King's Advocate, raising an indictment in his own name alone, comes to have full power of accusation vested in him. He represents the King, who represents the nation, including in this respect the private avenger himself, who must be held to have trusted his right of vengeance, as well as that of the public, to this great officer. Accordingly, it seems that, in general, those ways by which a party obtains protection from punishment by the act of the Lord Advocate, do avail against the private prosecutor, who has not previously come forward: Thus, if the King's Advocate is dilatory, or inaccurate in proceeding, after apprehension of the criminal, who thereby obtains final liberation on the act 1701, that criminal is as safe from private, as from public prosecution,—though the private prosecutor may be absolutely blameless,—may be absent, abroad, on a sick-bed, *non compos*, or a pupil. The intimation

ordered by that statute is, to—'His Majesty's Advocate, or pro-
'curator-fiscal, and party appearing by the warrant to be con-
'cerned, *if any be within the kingdom.*' So that it is manifest, that in many cases prosecuted by the Lord Advocate, there can be no information to any private *party*, particularly in cases of murder. Yet, the act provides,—'that if the Lord Advocate 'failzie, the process shall be deserted *simpliciter*, the party im-
'prisoned to be for ever free from all question or process for 'the foresaid crime or offence:' So, if the Lord Advocate draw the indictment erroneously, in respect of time, place, or circumstance,—or if he omit necessary witnesses, (as, for instance, by not calling necessary *socii criminis*), or cite them erroneously, or examine them insufficiently, or allow them to be present in Court, or suffer them to be disqualified by improper communications, or in any other way fail in his prosecution, and the criminal is acquitted,—it cannot be denied that his acquittal is as valid against the private party, who might have prosecuted, as against the King's Advocate: So, if the Lord Advocate restrict the indictment to an arbitrary punishment, or depart from part of it, this avails the criminal equally against the private prosecutor: So, if the King's Advocate decline to move for judgment after conviction. In short, I have heard not one case referred to, in which the contrary was ever found, in any respect, numerous as have been the instances of such complete or partial exemption from punishment by the act of the King's Advocate. I do not absolutely say there may not be such cases, but I do not recollect to have heard any case stated, in which it was argued such a thing could happen, except the case of indemnity to a *socius criminis* giving evidence. I cannot see anything, therefore, contrary to the general principles of our law, in holding that a private party, having a right to prosecute a *socius criminis*, who stands back and allows the King's Advocate to bring that *socius* before the Court as a witness, is bound, by the consequence of that procedure, as well as by the Lord Advocate's procedure, under the act 1701, or in the conduct of a prosecution against that *socius*. But it is very little necessary to go into argument on this point. For, in truth, all the authority by which it is established that a *socius criminis* appearing as King's evidence, has protection against the King's Advocate, equally establishes that he has protection against the private prosecutor. In the case of Brodie, the words of the Lord Justice-Clerk, Macqueen, were, that 'no-
'thing he' (the witness) 'had *done*, or could say, respecting 'that matter,' (*i. e.* the matter libelled), 'could militate 'against him *in any way*.' It is plain this applies to the dan-

ger of prosecution from the party, as well as from the King's Advocate. And the very same form of declaring the law, has been substantially followed, I believe, in every case since that time, where there had been a *socius criminis* produced as a witness. The words of Mr Hume shew it, and it is in a great measure known to your Lordships personally. Nor is this all. I believe the present to be the very first case in which an attempt has ever been made by the private party to bring to trial a King's evidence. Yet, in almost all cases, there must be some private party originally entitled to prosecute, since the party injured himself has the right, if he survive; and in murder, or culpable homicide, the relations have it. The total absence of such prosecutions is, therefore, conclusive as to the understanding of the law, and the nature of the practice, so that I really see no room for doubt on this point.

III. It only remains to consider the question, whether there be any thing in the special circumstances of this case, by which the protection or indemnity of Hare is defeated or excluded, in regard to part of the indictment, on which he was cited as a witness, and particularly, in relation to the murder of Wilson?—a question which, after what I have said, I must think, stands in the same situation, whether the party alleging such defeasance or exclusion be the Lord Advocate, or the private prosecutor.

In considering this, I am not much inclined to rest weight on the theory of the origin of this protection. I certainly cannot adopt that theory, which supposes this protection to have been derived from the statute 20 Geo. II. c. 34. For that is a very special statute, made with reference to the state of the country at the time (1748,) a few years after the Rebellion of 1745; and it contains not one clause only, as has been noticed by the counsel, but two clauses respecting *socii criminis*. The first is section 20, which relates to bands of Highland cattle-lifters, a sort of thieves at that time viewed with peculiar displeasure, because they were *rebellious*, as well as rapacious; and it provides, that such persons being *socii criminis*, may be made witnesses; but that the indemnity shall obtain only in case the *socius* 'shall, as a witness, give evidence that the same 'was committed by the prisoner or pannel, or that the said 'prisoner or pannel was art and part thereof.' This harsh provision was founded on jealousy of the attachment of these Highlanders to each other. It was thought, I have no doubt, that if any one of the band was once sure of his own safety, there would have been little chance of getting any thing out of him against his fellows. And, accordingly, the

Legislature made a very sharp bargain with these clan-witnesses. The next clause, section 21, relates to another sort of men, not then in favour, viz.—Nonjurors, *i. e.* persons present at unlicenced Episcopal meeting-houses. These persons are exposed to be called as witnesses, in cases where they were *socii criminis;* and the protection afforded to them is only that the evidence given by them shall not be used against themselves. And in neither clause is there any limitation to witnesses brought forward by the King's Advocate.

It seems quite certain, that *socii criminis*, under the practice now established, never were subjected to either of these limitations; and sufficiently certain, that the indemnity under that practice, was never extended to witnesses for private prosecutors. From the first appearance of that practice, the indemnity was complete, and had no dependence on the nature or effect of the evidence given, and it was limited to King's evidence. It is, therefore, not only impossible to suppose that this act, so expressly limited both as to place and crime, was extended to all places and all crimes, but it is plain, that the extension of it would not have formed the existing practice.

I should rather think more probable the theory which Mr Jeffrey suggested, that the older practice had been to provide the witness with a previous remission or indemnity, on condition of his giving evidence; and that, in the end, it came to be held, that the production of the *socius* as a witness, on the part of the King's Advocate, implied that he had such indemnity; and rendered him, in fair procedure, entitled to the benefit of it. I see that Sir James Stewart, who was, as I formerly mentioned, eighteen years Lord Advocate, in the reigns of King William and Queen Anne, says,—'*Socii criminis* being often necessary, if they be first either purged or indemnified, are in use to be admitted witnesses.' Sir James seems not satisfied as to the propriety of the practice, but he could not be mistaken as to its existence. Mr Erskine alludes to the same practice in both his works. And Mr Burnet notices the '*usage* of special pardons to accomplices, for enabling them to give evidence.' Considering the existence of this previous practice, and the nature of that practice which succeeded it, I certainly think that the theory I have mentioned is more probable than that one deriving the practice from the statute.

If, however, we are to give weight to that theory, the question now considered would be solved at once. For undoubtedly, under the practice of previous remission or indemnity, to which Sir James alludes, Hare would have been freed, at least from all that was in the indictment, and at least as soon

as he was put in the witness-box. And on this theory he ought to have the same benefit from the implied or virtual remission or indemnity.

But, be the theory of the origin of this practice what it may, this, at least, appears to me plain, that the protection of the *socius criminis* under this practice, is of the nature of a judicial arrangement or *quasi* contract, by which, on the one hand, the King's Advocate, as representing his Majesty and the public, does, by production of the witness, judicially extinguish the right of penal prosecution for the matter in which the witness is produced; and, on the other hand, the *socius criminis* is deprived of his right to decline answering, and is bound to give evidence, however it may criminate himself in that matter. Such I conceive to be obviously the true nature of the constitution of this right of protection. The protection plainly does not depend upon the explanation that is generally made by the Court to the witness. That may easily be omitted; for the fact of any witness being a *socius criminis*, does not appear on the indictment, and may not be known to the Court. Nor does this explanation enter the record; nor is its form that of an act of the Court, constituting right. It is not even made by the presiding judge, but the judge who swears the witness. The omission of it could never deprive the witness of his protection. As little does the indemnity depend on the nature of the evidence given by the witness generally. It takes place, and has, provided he does not refuse to give evidence, been explained to him before he gives evidence at all. It was perfectly understood in the case of Brodie, distinctly explained there, as well as in every case since, that the witness was safe in speaking *the truth*,—because, whatever his evidence should be, he was equally free from punishment. The only doubt ever was, in case of his refusal to give evidence.

Such being the nature of this proceeding, the question arises next, whether this, like all other parts of criminal procedure, must not, in all cases, have an interpretation and effect, such as is fair and just, particularly towards persons whose lives are in jeopardy? I can have no doubt of this. I cannot conceive that this effect can be denied to any judicial procedure that is legal, whatever may have been its origin. I repeat, then, I can have no doubt of this generally, and none, certainly, that it must apply to the wretched man Hare, as well as to others. If, as is said, (and in one instance, at least, it is but too difficult to refuse assent to it,) *he* has forgotten that he bore the form and nature of a man; Yet we must not forget it. He has still the rights of a British subject; and we are bound, by our oaths of office, to say that he shall not suffer in-

justice here; that he shall not be defrauded of his life by the effect of any procedure before us.

I ask, then, abstracting from the circumstance that the trial of the three acts of murder charged against Hare was divided by the Court, whether, in case the Lord Advocate, after bringing forward Hare to give evidence in the indictment against Burke, had stopt in his proof, after establishing the murder of Docherty, he, (or the private prosecutor, which is the same thing,) could have taken advantage of this to deny the protection of Hare, in respect to the two other acts of murder charged in that indictment? I cannot have the least doubt that this could not have been done. It would have been clear, that the *quasi* contract of indemnity was constituted before the witness gave any evidence at all, by his production as a witness on the part of the Crown; and that the measure of his indemnity must be taken from the matter in respect to which he was produced to give evidence,—*i. e.* the indictment, not the questions which the Lord Advocate, in his discretion, thought proper to ask, or the conclusions for which he might choose to insist. That the Lord Advocate might limit his prosecution, if he pleased, in some respects; but that it would be gross injustice to allow him to limit it to the effect of taking away the effective protection of his witness.

If this would have been clear, I am not able to see how it can make any difference, in material justice, that the particular course was adopted which actually was followed. It was competent for your Lordships to direct various courses for trying the indictment against Burke. It might have been tried by one Jury, at once returning a verdict on all the charges; or by one Jury returning a verdict on each charge separately, after hearing evidence on that charge; or by two Juries, of which the first returned a verdict on two, and the other on one charge; or by three Juries, each hearing evidence, and returning a verdict in reference to one charge only. This last mode was adopted. But still this, as well as any of the others, was a mode of *trying that indictment*; for the indictment was not thrown out, but found relevant; and the whole proceeding was to be on it alone. In it only was, and once only stated, the major proposition of the libel,—the clause of art and part,—the conclusion for punishment,—the notice of productions,—and the list of witnesses.

Hare, then, even if he had been fully acquainted with the course that was taken, might have said, that still the indictment must afford the measure of his protection; that he was entitled to expect, that, by whatever mode of procedure, this

indictment was to be exhausted, that he had nothing to do with the number of juries or verdicts; and that, at any rate, the Lord Advocate could not stop in the trial of the indictment, so as to prejudice his protection.

But in fact, (and this applies particularly to the question of fair dealing,) he was never made acquainted with this arrangement, or had the least hint that it made any change in the extent of his own indemnity. If he had been made to entertain even a doubt on that subject, he would assuredly have kept his mouth fast shut. Not being insane, if he had believed himself in danger of being tried for murdering, and supplying the surgeons with two bodies, murdered by him for that purpose, he would never surely have given evidence that he had previously done so on one occasion, and was intimate with another murderer of that horrid sort. But he had no such warning. It is true he was told to speak only to the murder of Docherty; but that intimation, made solely for fear of prejudice to Burke, must have been understood by him as meant only *in the first place*,—not at all as implying that he was not afterwards to give evidence in respect to the other charges, from which at the time, indeed, the Lord Advocate had formed no intention of departing. Standing thus called, and thus unwarned, he gave evidence which amounts to a *semiplena probatio* against him, if he should be tried for the murder either of Wilson or Paterson,—evidence which most materially served to convict Burke, (being most important, in reference to the *corpus delicti* in particular); but which, at the same time, implicated himself in the most fatal manner, unless he was protected in all the cases as King's evidence. After he did this, could it possibly have been conceived to be consistent with fair dealing,—with just procedure,—if the Lord Advocate had turned round upon him, and told him, that as Burke was convicted of one murder, and could suffer death but once, he would stop the course of the indictment against that person, and, in reward for the public service he had done, he, the Lord Advocate, would now turn the remaining charges in the indictment against him, already a confessed murderer for the surgeons, whose conviction must therefore be easy! Would that have been tolerable? If it had been done, might not this wretched man truly have said, that he was as much cheated out of his life, as ever was wild animal in the snare of the warrener? I do think, if the Lord Advocate had attempted such a thing, your Lordships would have rejected it with reprobation. You would have said, unanimously, that as the established practice (a practice which you had no power to change) caused the indemnity of witnesses to take place by a judicial arrangement,

made under your authority, you must be bound, by the universal and eternal rules of justice, to prevent an oppressive and fraudulent abuse of this part of your own procedure. I know well the Lord Advocate neither has done, nor will do this: I know he will do nothing but what is just and honourable; but the supposition is decisive of the present question, because the respondents can have no right to do what he could not have done. I respect the motives of the respondents, one of them particularly. She is the mother of poor Wilson, and cannot be expected to weigh fairly the rights of one whom she views as the murderer of her son. But we at least must look on them more calmly, and are, I think, bound to say, that she has no right of prosecution, if the King's Advocate be barred. Your Lordship will observe, I am not founding upon mere extrajudicial transactions. Nor do I found my opinion upon what took place in the Court, after the discussion about the question by the pannel's counsel was put respecting *other murders*. I do not care, therefore, what was said by either counsel or Judges on that occasion. Before that question was put, the indemnity of Hare was complete. For, before that question was put, he had been brought forward as a witness in the indictment, and had given his evidence for the Crown. At the same time, I may say that I do not conceive that the present question was at all in view at that discussion, or the opinions given upon it. Mr Cockburn did not say that he wanted to put questions respecting the murders of Wilson and Paterson, and that he was entitled to go that length, because, to that extent, the witness was protected. Nor did the Lord Advocate make any counter statement in reference to them. Mr Cockburn, I suspect, sought what he obtained,—a declinature to answer; and, therefore, broadly put the question, as to 'other murders,' expressly saying, that he meant to ask the witness to reveal his whole life and conversation.

On that form of question the discussion followed, and opinions were given, in which, it may be, that the peculiar situation of the witness, in relation to the murders of Wilson and Paterson, was forgotten; but certainly there was no intention on my part, or, I believe, on the part of any of your Lordships, to give an express opinion that he had no protection as to these. The complainer quoted some words of mine, as if they pointed at an opposite opinion. I had not formed such opinion, and did not use those words with that intention; nor do I think they imply it. But neither am I conscious of having had any opinion formed, that there was not protection as to those charges. According to my recollection, the point of distinction

was not at all considered. It escaped attention, from the way the matter was put to us, and that is all that can be made of it. I do not consider myself at all pledged by any thing which took place then. Nor did I feel so pledged when you started the point, and asked our opinions, before charging the Jury. Accordingly, I then felt bound to agree with your Lordships' opinion, and did concur in it. The delivery of that opinion I do certainly consider as of weight. It was solemnly given as direction to the Jury. Still, however, one *dictum* of this Court, particularly without express argument on the point, is not sufficient to tie us up absolutely; and if I was now satisfied that it was wrong, I should not hesitate to admit this error; and would certainly not repeat it now, to the prejudice of the respondents' rights. But ampler discussion and consideration have only confirmed in me that opinion. The more I look to the practice of this part of our legal procedure, and to the great principles of general justice, that can never be lost sight of in considering the effect of any transaction, particularly a judicial one, the more I think that this wretched man has acquired a right to immunity in all the three cases that were charged in the indictment against Burke. Remembering, as we must do, the dreadful evidence he gave, it is impossible to contemplate his escape without pain,—a pain always felt, in some degree, in every case where an accomplice in a great crime, is, however necessarily, taken as evidence for the Crown, but never, I believe, felt more strongly than in the present. I sympathize in that feeling. But I feel not less strongly that this man, however guilty, must not die by a perversion of legal procedure; a perversion which would form a precedent for the oppression of persons of far other characters, and in far other situations, and shake the public confidence in the steadiness and fairness of that administration of criminal justice, on which the security of the lives of all men is dependent.

Lord Alloway.—I agree with every thing that has been stated by my brethren, with regard to the ability with which the debate has been conducted by my friends at the Bar; and I may also state, that never since I sat in this Court, nor at any former period, have I ever heard opinions delivered by the Court, of greater research, or greater talent. I certainly, as an individual, have received the greatest benefit from them, in point of information; and many of the acute observations of my brother, Lord Mackenzie, have made a considerable impression upon my mind. But, with all the profound respect I have for the opinions of your Lordships, and with all the pain I feel in differing from the opinions of the majority of my

brethren, it is my bounden duty to express whatever my opinion is, and the reasons upon which it proceeds. At this very late hour, I should be sorry to take the wide range which my consideration of this subject might have required; and I am most anxious to confine myself to as few observations as possible, since the opinion I entertain has been so well expressed by my learned brother, Lord Gillies, who spoke first, and in whose opinion I so entirely concur, that in going over the same reasoning, I should only weaken the powers and effect of his Lordship's argument. I entirely concur in what has been stated by all your Lordships, with regard to the conduct of the Lord Advocate, as stated in his Lordship's answers. I think his conduct has been manly and candid, and has been regulated by the soundest discretion, for the public interest. I think that the circumstances of this case, which he has made known to us, sufficiently authorised and justified the judicious measures which he had adopted for the discovery and punishment of the most atrocious offences which ever disgraced this country; and, indeed, this is strongly confirmed by the verdict, by which the charge against M'Dougal was found not proven. But, as shall be afterwards noticed, he has the power of redeeming his pledge, without calling upon the Court to exercise powers, which many may think new, and at variance with legal principles. It has, with great eloquence, been maintained, upon the part of Hare, that since the establishment of a public prosecutor, for the public interest, the rights of the private prosecutor have ceased;—that it now remains with the respectable officer holding the appointment of public prosecutor to pursue, *ad vindictam publicam*;—and that nothing is, or ought to be left to the private prosecutor, but private or pecuniary reparation;—and that to discountenance all private prosecutions, they are attended with restraints or fetters, to which the public prosecutor is not subject,—such as an oath of calumny,—the finding of caution,—the risk of being subjected to expenses in case of failure,—independent altogether of the great advantages which the public prosecutor enjoys, by being entitled to examine the nearest relatives of the injured party, and even associates in the offence, with impunity. All this is true; but, from these circumstances, in a Court of Law, I draw a very different conclusion. All the restraints and burdens imposed upon private prosecutors, demonstrate, that the right of prosecution is vested in them. These restraints are all introduced, lest the warm feelings of individuals injured, should carry them farther than the security of the individuals accused might warrant. All these are wise and wholesome restraints

upon private prosecutors, which do not apply to the public prosecutor, to whom, on account of his elevated situation, and his being unsuspected of individual interest, there was no occasion to apply them. But one and all of these restraints, imposed by law upon private prosecutors, demonstrate, that under these safeguards, private prosecutors have an unquestionable right of prosecution for all offences, in which they have a peculiar and individual interest, just as general and unlimited as the public prosecutor has. And, therefore, every restraint to which the private prosecutor is wisely subjected by law, distinctly substantiates the right of the private prosecutor to pursue, *ad vindictam publicam*, every offence in which he is interested, just as much as the public prosecutor himself. We, as a Court of Law, are not sitting here to determine what is most expedient, and most advantageous: this belongs to the Legislature alone, and not to a Court of Law. My opinion, that a private prosecutor has an undoubted right to prosecute to the highest doom, every offender who has injured him, and for the punishment of all offences in which he has an individual interest, is founded upon the authority of every Institutional Writer upon the criminal law of Scotland,—upon a variety of statutes,—upon the decisions of this Court, and upon the practice of the country. I should have thought the opinion of all our Institutional Writers upon this subject, without one single authority to the contrary, would have been sufficient to prevent the contrary doctrine from being maintained, chiefly upon the ground of expediency and advantage to the public. Indeed, our older writers shew, that the private party was the chief prosecutor, and that the public prosecutor was only subsidiary. But I wish not to go into authorities, when the subject has been so universally laid down by our latest and most approved writers on the subject,—by Baron Hume, Vol. II. p. 115, whose last edition was published in 1819, only ten years ago, and by Mr Burnet, p. 296, published in 1811; and the last of whom, after agreeing with Mr Hume, and laying down the universal right of private parties to prosecute for the punishment of all offences in which they were individually interested, mentions that this right still subsists with the same effect, and to the same conclusions, as to the full pains of law, as a prosecution at the instance solely of his Majesty's Advocate.—*Burnet, p.* 297. Indeed, Mr Burnet speaks of the union of these two modes of prosecution, as constituting the pre-eminence of the criminal jurisprudence of Scotland,—that it is by preserving both in full vigour, that public justice is effectually secured; that the remissness and partiality of the public prosecutor is, on the one hand, guarded against, and the too great lenity and forbearance of the indivi-

dual corrected on the other; and he imputes it to this cause, that in this country no prosecution can, in any instance, be stifled, and the feelings of the individual or kinsman outraged by a denial of justice; while, in other countries, the *nolumus prosequi* of the public prosecutor, stops in many cases any process at the instance of the party injured. Thus, upon this great constitutional question of the right of the private prosecutor, Mr Burnet seems to rest not only the pre-eminence of our criminal jurisprudence, but the certainty of all offenders being prosecuted *ad vindictam publicam*. I am most ready, as an individual, to pay the just tribute of applause to the Lord Advocate, and the gentlemen who assist him in the administration of criminal justice in this Court. Ever since I was a member of it, I have seen nothing to blame, but, on the contrary, every reason to praise the singularly humane and mild manner in which the criminal business is conducted. I have never seen any serious doubt thrown out as a plea for the prisoner, without its receiving the most candid discussion upon the part of his Lordship; and if a doubt remained, the instant abandonment of the case left an example of moderation to his successors. But, as my brother, Lord Meadowbank, has depicted the unjust proceedings both of the Court and of the prosecutors in former times in glowing colours, we cannot forget that there were evil times when the most atrocious conduct took place with regard to the prosecution of offenders. And who can say that bad times may not again occur in this country? I am, therefore, most anxious that every constitutional right, especially that of private prosecution, which has been handed down from our ancestors, as the great check and security for the punishment of offences upon which our institutional writers have placed such importance, shall be preserved, and be transmitted unimpaired to our posterity. My brother, Lord Meadowbank, in his very learned statement, seemed to conceive, that in early times, before the appointment of a public prosecutor, the preparation of the trial, both as to culprits and witnesses, must have been in the hands of the Justice-Clerk, and of this Court. But this certainly proceeds upon a mistake. The Justice-Clerk, although now for a great length of time at the head of this Court, then sat at the table as a clerk, and issued all the executorial of the law, in the same way as the person bearing a deputation from him now does; and I could hardly conceive a greater outrage upon all criminal jurisprudence, than that the Court who was to try the case had the means of preparing the evidence, and selecting the culprits who were to be tried before them. But, dreadful as the representations of many of our old trials have been, and disgraceful as they are

to the country where they took place, I do not think that the High Criminal Court ever stood in this situation. After the appointment of the Lord Advocate, as public prosecutor, I also conceive, that his Lordship's view is equally erroneous; because, instead of the Lord Advocate, as the public prosecutor, being the sole person for selecting the culprit and the witnesses, long after his appointment, we find repeated statutes giving encouragement to private prosecutors, and we find repeated judgments, in the most important trials, at the instance of individuals. For, although the Lord Advocate is mentioned as public prosecutor in the act 1579, c. 78, yet, in the course of the 17th century, there are two different acts encouraging private parties to prosecute criminally, and which shew the universal practice in that respect. The act 1612, c. 4, enables the parents or nearest of kin to prosecute for the offence of rape, even although the criminal endeavour to protect himself by the subsequent consent of the woman ravished. And by the act 1671, c. 26, it is provided, that although in the case of conviction of the thief, the stolen goods belonged to the Crown, yet that they shall, from that time, belong to the person from whom they were stolen, provided the owner pursue the thief *usque ad sententiam*. And we well know, that during that period, criminal prosecutions were chiefly at the instance of private prosecutors. This is expressly mentioned by Burnet, p. 297, although the concourse of his Majesty's Advocate was added in order to secure any interest which the Crown might have. And, in the 18th century, in 1723, a trial occurred in the case of Charteris, at the instance of a private party, for a capital crime, with the concourse of his Majesty's Advocate; and the concourse having been withdrawn immediately before the party was proceeding to trial, informations were ordered to the Court upon the relevancy of the charge at the instance of the private prosecutor. In that case, argument was maintained by the most eminent lawyers then in Scotland, upon the same ground with the plea stated in Hare's information; yet the Court found the libel relevant. It appears that the offender in that case had obtained a remission; but being called upon by the Court to say whether he founded upon it, he, at that time, waved the privilege arising in a great degree from it; and the proof having failed, in consequence of which a special verdict was brought in, the pannel was subjected in £300 of damages and costs. No doubt is entertained, either by Barnet or Hume, that the Lord Advocate may be compelled to give his concourse. Sir Thomas Hope, who had refused his concourse to an action of reduction-improbation, because he conceived the interest of the Crown was to support

the deeds attempted to be improved, was obliged by the Court to give it, although his right to appear for the Crown, with the other side, was reserved. And in the case of Sir John Gordon, Maclaurin, p. 258, it was found, that the Advocate might refuse his instance; although, as strongly expressed by Lord Alemore, in that case, if the Advocate had refused to give his concourse, he might have been compelled to give it, for every one is entitled to justice.—*Maclaurin*, p. 298.

And we have had many instances, even in the most recent periods, of prosecutions for the highest offences, at the instance of the private party, with the concourse of the public prosecutor, and many of the accused persons were not only convicted, but executed. In 1803, no less than five persons were tried for their lives, at the instance of the nearest relations of the persons killed by the military in a riot at Aberdeen. In that case, the Lord Advocate refused to prosecute, and no person could compel him; but he could not refuse his concourse; and Colonel Mackenzie, Captain M'Donach, and three other persons, were in this way exposed to the peril of their lives, without a single objection being stated (as Lord Gillies, who was counsel for one of them, has mentioned) to the relevancy of the libel. And, besides, every one remembers, that until within these few years, all the prosecutions for forgery were at the instance of the banks, with concourse of the public prosecutor; and in the only case reported, that of the Royal Bank, with concourse of his Majesty's Advocate *against* Young, that person was executed.—*Maclaurin*, p. 122. I cannot conceive, therefore, how a doubt could be started, that it was the right of the private prosecutor to prosecute for a criminal offence, by which he had been injured, and that this right exists at this moment, in the same vigour that it ever did in the law of Scotland, and can neither be stifled, controlled, nor affected by the right of the public prosecutor, although the most ample means remain in his power for keeping the faith which, with the highest discretion, he may have pledged in favour of any offender.

This leads me to consider the situation of a *socius criminis*, and the nature of the protection which can be afforded him, either by this Court, or by the Lord Advocate. I differ from the view which has been taken by my learned brother next me, (Lord Meadowbank), as to what was formerly the law of Scotland, and the protection which *socii criminis*, when examined, could obtain. I can see no reason to doubt the opinions of Hume, of Burnet, of Mackenzie, and our older lawyers; and I must even reject the opinion of Lord Hailes, much as I respect it, in speaking of Mackenzie being inaccurate or

ill-founded on this subject. With great deference, Sir George Mackenzie, who acted for a great length of time as Lord Advocate, at a period when there was a most lamentable number of trials, and for the most serious offences, is a better authority upon this subject than Lord Hailes can be, nearly a century afterwards. I cannot conceive that, with regard to the rules and principles of his own conduct, and the practice of the law at that period, Sir George Mackenzie is not the most competent authority. Indeed, the admission of a *socius*, as taken notice of by Lord Meadowbank, in the atrocious trials referred to, and which his Lordship himself admits were so very bad, could hardly be received as any authority. I am afraid, that if these horrible periods were to be ransacked, there would not be wanting the most numerous instances of oppression and injustice, directly in the face of all law; and, therefore, I cannot conceive that these cases can weigh against the united opinions of all our writers, ancient and modern, so fully confirmed by the practice of the Court. I rather agree with Baron Hume in tracing the change that began to take place in our law, to the act 21st Geo. II. Mr Erskine also refers to it; and I really cannot help thinking, that this statute of itself is a complete refutation of the theory which my learned brother, (Meadowbank), has supported with such ingenuity. In 1748, when that act passed, could any person have entertained the notion, that it was competent in Scotland to examine a *socius criminis*, or that he had any indemnity for criminating himself when he was so examined, when it required a special statute, *first*, for examining him, and, *secondly*, for preventing his being again tried for what he had said as a witness? No doubt the statute is confined to particular offences; but certainly the principles of it might have applied to all offences; and although it is impossible to doubt that a general statute should have been obtained, applying these enactments to all crimes whatever; yet, as Mr Hume observes, it may have laid the foundation for a practice in the Court, consistent with this principle. But a statute passed in 1748, is at this moment in *in viridi observantia*. No statute passed since the Union can be obsolete; and it seems to have been utterly impossible that this Court could grant any protection beyond the indemnity granted by the act. Now, the indemnity granted by the act could only apply to the case of the witness when examined in a trial; and it is impossible to apply it, either to any private agreement, which may have been entered into between the public prosecutor and the witness, to any thing which may have passed on a precognition, or to any thing but what had been stated by him as a witness on that trial. This, I conceive, is the

highest extent to which the protection by this act could be extended. The first case we have is in 1770, that of Jameson, only 22 years after the passing of the act, in which the notions of the Court were certainly not very clear or distinct. In Smith and Brodie's case, however, 18 years afterwards, I admit that the Court did give a much more clear opinion; and, although the opinions delivered by the very first Judges in Scotland, as applicable to the law of Scotland, in 1794, in Downie's case, seem to leave great doubt upon the subject; yet as 40 years have run from the decision in Brodie's case, which has since been confirmed by many others, I am willing to assume, that by the practice of this Court, a protection has been held out, that nothing stated by a witness on a trial shall be held to inculpate himself, or that he could be tried for the same offence as to which he had given testimony. But I cannot conceive that any protection could be held out by the Court beyond that granted by the statute, or that a court of law could give a protection beyond what the statute provided, although, in practice, it might be extended to other crimes than those contained in the statute. As 40 years have therefore elapsed since the trial in the case of Smith and Brodie, in which a clear opinion was given by the Court with regard to this protection, I am willing to hold that, by the practice of the Court, a complete protection and immunity has been held out to the witness against his being tried for whatever he has uttered as a witness criminating himself. Holding this to be the case, therefore, I conceive that Hare might have a protection as to the murder of Campbell, he having been a witness against Burke and M'Dougal in their trial for that murder. But my doubt is, how far, by his being examined as a witness on that trial, he could have any protection in the case of the murder of James Wilson, or in the case of any other trial for murder, in which he was not examined as a witness, and could not have been examined, no such trial having ever taken place. It is very true that Burke was accused, in one indictment, of three acts of murder; but there was only one of these acts, that as to the murder of Docherty or Campbell, sent to trial. The interlocutor of relevancy certainly applied to the whole indictment; but the trial was confined entirely to the third charge, for the murder of Docherty or Campbell. With regard to the two other charges contained in the indictment, as to the alleged murders of Wilson and Paterson, it is quite clear that no trial either did, or could take place, although the Lord Advocate might, upon that indictment, have afterwards proceeded to the trial of those other two charges of murder. Indeed, they seem to have stood precisely in the same situation as

if there had been separate indictments, upon which an interlocutor of relevancy had been pronounced, and which afterwards might be tried or not, as the public prosecutor thought fit. As I was not present at the trial, it is impossible for me to judge of the printed account of it. One of my brethren, (Meadowbank), seems to admit that it is pretty correct, while Lord Mackenzie has altered the statement, as represented to have been made by him, and I have no doubt he has done so most accurately. But still I must entertain doubts how far this Court, as a Court of Law, could give any protection to Hare, as a witness, with regard to those two charges, as to Wilson and Paterson, or any other cases in which Burke never was tried. And I conceive, that as it is only by a person being examined as a witness in a particular trial, that the Court can extend its protection to the crime as to which he has been examined, this cannot be extended to cases in which he was not examined, and as to which the Court must be totally ignorant. With regard to any crimes not contained in the three acts charged in the indictment, I conceive it would be impossible to claim any protection, at least from this Court, as a Court of law. And upon the same ground, although this protection extends to the case of Docherty, in which he had been examined, I cannot conceive how it can be extended to the other cases as to which he was told not a question could be put to him, and in consequence of which he declined to answer every question that was put to him with regard to any other murder, and particularly the murder which had taken place in his own house, in October. It is surely not enough that a libel has been executed, containing three charges, and that a person has been cited as a witness on the indictment, to give any protection as to the cases which were not tried. Supposing that the private party had discovered evidence to accuse any of the witnesses cited to prove the indictment as to Wilson or Paterson, of being art and part in either of these murders, and who had never been examined at all as to Docherty, could they have pleaded the protection of this Court, or an exemption from trial, because their names had been in the list of witnesses in the indictment, containing those charges against Burke, but which had never been tried? Upon the same ground, I conceive, that although Hare was examined on the trial of Burke and M'Dougal, as to the murder of Docherty, he unquestionably was never examined, nor was one question put to him, nor could it have been put to him, with regard either to Wilson or Paterson, without his being told that he was not bound to answer it; and he accordingly declined to

answer all such questions. As Hare was therefore examined as a witness with regard to the case of Campbell alone, I do not see how this could give him any privilege or protection in the case of Wilson or Paterson, or as to any other offences in which he was not examined. For if I understand the trial at all, as it has been printed, it was entirely confined to the murder of Campbell, and it was not competent to put a question to him in relation to Wilson or Paterson. And therefore, giving every possible effect to the statute 21st Geo. II, and to every thing that has been stated by our institutional writers, Hume and Burnet, and to the decision in the case of Smith and Brodie, which has been followed in practice since that time, I can find no authority for this Court extending its protection beyond the case in which the person pleading it had been examined as a witness Indeed, if the Court can extend this protection so as to prevent all investigation whatever by the private party, either in consequence of an agreement with the public prosecutor, or with regard to other cases not tried before them, it would confer upon the public prosecutor, or upon this Court, powers which the Crown, the great fountain of mercy, does not possess. I have already stated, that I conceive that the Advocate is bound to fulfil his pledge, and preserve his faith, even to the greatest criminal that ever existed;—and his Lordship has the most ample means in his power of doing so, in the most constitutional manner, by procuring a remission from the Crown, or a pardon, for which he cannot in vain apply. By acting in this manner, the rights of all parties might be preserved: for, by a variety of statutes, the Crown cannot grant a remission or pardon, without subjecting the party to find caution for the assythment. These statutes are mentioned by Baron Hume, Vol. I, p. 280; and cases are, unfortunately, found in our books, where the parties not being able to find caution for the assythment, were actually executed. This happened in the case of Dunn, mentioned by Hume in a note, Vol. I, p. 280. This tends to shew the serious nature of assythment, by our law, which is totally different from the civil claims of reparation, which may be applied to every case where an injury has been sustained, and even to the case of a party acquitted of a crime. But assythment can only be claimed, in the *first* place, where the pannel is found guilty of culpable homicide. If he were found guilty of murder, no assythment can be claimed. And, *secondly*, it is due when the sentence or proceedings are prevented by a remission, or a pardon. And assythment cannot be claimed in any other circumstances. It is shewn by Maclaurin, p. 59, that a remission, so late as the year 1717, was held equivalent to an ad-

mission of the fact, and that the party could not thereby be deprived of his assythment. In the case of Malloch, who was convicted of murder, but was pardoned from some exception taken to the verdict, the Court found the pardon did not remove the claim for assythment due *ex delicto*,—Machaurin, p. 126. And the civil court, in that case, refused a *cessio bonorum*, as the assythment was a punishment due *ex delicto*. I shall not go over the other cases, so well stated by Lord Gillies, except to make a single remark on the case of Leithhall. In that case there had neither been a trial, remission, nor pardon. But Abernethy of Mayen, the person accused in this indictment, had escaped, and sentence of fugitation upon the indictment, for murder, had been pronounced against him. The question was, whether this fugitation afforded such *prima facie* evidence of murder, as to warrant assythment against Lord Fife, the donator of the escheat, or whether it only amounted to a contempt of the Court? It was there maintained, that in Campbell's case, the Court had been almost unanimously of opinion, that an assythment could not be claimed, either where a capital punishment had been inflicted, or where the criminal had not been brought to trial. It was clear, that the Court of Session could not admit a proof of murder, nor had it ever done so. The Court at first found, by the narrowest majority, that no assythment was due, but afterwards found assythment due. And Mr Hume, in considering the question of assythment, thinks this a most doubtful authority. And I certainly entertain the same doubts, as fugitation did not afford the same evidence of guilt, as either a remission or pardon necessarily did. Of course, if the Court do alter the Sheriff's judgment, either they, or the Lord Advocate, by this means, can deprive this party, and every private party whatever, of assythment. Yet, the King, as the sole fountain of mercy, could not, by granting a remission or pardon, exclude the assythment. So that, in this way, by the stopping of all procedure, this Court may have the power of placing individuals in a situation which the Crown itself, by a pardon or remission, could not do. The Lord Advocate may redeem his pledge by a remission or pardon,—but neither of these could deprive a private party of those rights of prosecution, which he unquestionably enjoys. Assythment arises only when a crime has been committed, and has been proved or admitted by a remission or pardon. But how can this be proved, if all investigation is instantly stopped? No assythment can take place in the case of Burke. There the vengeance of the law has had its full effect, and Hare may be protected by the practice of this Court; but I doubt much how far this Court has any

right to stop the private party in a prosecution in a case in which Hare has not been examined as a witness.

Lord Justice-Clerk.—My Lords, We are called upon, on the present occasion, to decide an important question in the criminal law of Scotland, and one that deeply affects the practice of this Court, in a material department of that law. And considering its importance, both in a general point of view, and as it regards the interests of the parties, none of us can regret that we have allowed it to be discussed in the fullest and most deliberate manner, and with very able assistance from both sides of the Bar.

We are now to decide, whether the prayer of the bill of advocation, and suspension and liberation, presented to us in the name of William Hare, is a legal and competent one, and ought to be granted? He prays for immediate liberation, and a stay of all farther proceedings in the precognition commenced by the respondents against him, as guilty of the murder of James Wilson, their near kinsman, upon the ground that, in consequence of the facts set forth in the bill, these respondents are not, by law, entitled to bring him to trial for that offence.

As to the objection that this application is not made in the proper time, it humbly appears to me, (with my brother on my right hand) to be ill-founded. Because, if it is not competent for the respondents to bring the prisoner to trial, it is manifest that he has a direct interest to insist for immediate liberation from that legal detention and confinement to which persons accused of capital crimes, for which they must answer in this Court, are necessarily subjected, as well as to have the precognition against him entirely quashed.

In considering this question, it is proper to attend, in the *first* place, to the situation in which the prisoner, Hare, actually stands at the present moment;—*2dly*, to the legal consequences that follow from that situation.

Now, as to the *facts* upon which he relies,—they are to be found set forth in the bill of suspension,—in the manly, straightforward, and explict statement contained in the answers of the Lord Advocate, put in at the desire of the Court, and which, I agree with all your Lordships, do him so much honour,—and in the actual examination of Hare, as a witness on the trial of Burke, under the indictment charging him with *three* acts of the crime of murder, including that of James Wilson, the individual now in question.

From the statement of the Lord Advocate, it is placed beyond all doubt, that with a view to the public interest alone,

he resorted to the course therein detailed. And considering the atrocious, extraordinary, and unexampled nature of the crimes to which his attention had been called,—the infinite importance of avoiding the risk of the escape from punishment of all who *then* appeared implicated in these crimes,—and the immense advantage of a public example from a conviction,—he did exercise a wise and sound discretion, in betaking himself to the evidence of Hare and his wife, and giving the assurance stated in his answers.

It, moreover, appears to me, that the propriety and wisdom of the conduct of the public prosecutor, in regard to the important and delicate duty he had to perform, have been most fully evinced by the result of the trial and conviction of William Burke. If, instead of following the course he did, he had indicted *Hare* and his wife, along with the other prisoners, for the murder of Docherty, (the public prosecutor having *then*, according to his own statement, no sufficient information regarding the murders of Wilson and Paterson,) and had failed to obtain a verdict, against the certainty of which not being the case, no one will venture to give an opinion,—it may be considered what would then have been the feeling of the public in regard to such a proceeding.

Keeping the above circumstances in view, and attending particularly to the nature and structure of the indictment exhibited against Burke and Macdougal, charging the single crime of murder in the three specific acts against Mary Paterson, James Wilson, and Mrs Docherty, or Campbell, all alleged to be perpetrated in the same way, and with the same *intent*, viz. for the sale of the bodies for dissection, in the list of witnesses subjoined to which, Hare and his wife were included,—the interlocutor of the Court finding the *whole* indictment relevant to infer the pains of law, but, upon the motion of the prisoners, allowing the separation of the charges, and the trial then to proceed as to the murder of Docherty alone,—the subsequent direction, at the desire of the prisoners, given to Hare, to confine his statement to the case of Docherty,—the examination which he then underwent, both for the prosecution and the prisoners, is to be carefully attended to.

To those who heard, or have read an accurate account of that examination, it must be manifest, that though directed to speak only to the particular act of the murder of Docherty, *Hare* did swear to circumstances that have a most direct tendency, not only to criminate himself, but to establish a guilty connexion with Burke, whose guilt in the murder of Wilson, as laid in Hare's own house, is specifically charged in the indictment. He swears to his having become acquainted with

Burke about a year ago,—to his being familiar with the term "*shot*," and what it meant, and its having frequently been used by Burke,—to the manner in which Docherty's body was sold,—and to his having got money, through Burke, for bodies, on other occasions, though they had had no quarrels about it. It is impossible, therefore, for any man to deny, that though, in reference to certain questions, he did, under authority of the Court, (which shall be noticed more particularly hereafter), decline making answers, in the language of his own information, 'Hare did surround himself with dangers from 'that examination.'

It remains, then, to be considered, what are the legal consequences of a person in Hare's situation being so dealt with;—*first*, in regard to the public prosecutor himself; and, *secondly*, in regard to the private parties in this case.

While it appears to me, that according to the long and established usage of the criminal law of Scotland, it is the undoubted privilege of his Majesty's Advocate, who prosecutes for the interests of the whole of the community, to select from those suspected of crimes, and to use, as witnesses, such persons, whose evidence he deems material to the ends of public justice, and to assure them, that upon giving evidence, he will never bring them to trial for their concern in the transactions as to which they are examined,—it is now a fixed principle of law, that the fact of the *socius criminis* having been examined, and given evidence, operates an entire immunity from any prosecution or trial on account of that transaction.

It is no doubt true, that it appears, that at an early period in our law, the objection to the admission of a *socius criminis* to give evidence in a criminal trial was generally sustained; though in regard to one species of crime, viz. *forgery*, it seems, even according to *Mackenzie*, and other writers, always to have been disregarded. And I see also, in a civil case, in January 1582, that of the *Stranger Flemings* v. *Burgesses of Edinburgh*, that *socii criminis* in regard to *acts of piracy*, though objected to, were received. Other important instances of the admission of accomplices, have this day been pointed out to your Lordships.

In the progress of society, however, and the increase of crimes, many of which it became obvious could never be detected without resorting to their evidence, *socii criminis* came to be acknowledged as admissible witnesses, in regard to all crimes. This progress in our law will in no degree appear surprising, when it is recollected how gradually only the many

objections, formerly sustained against witnesses,—from their sex,—being domestic servants,—and in other situations, as laid down by Mackenzie, and other early writers,—came to be disregarded.

In reference, however, to the objection arising from the supposed interest of accomplices to screen themselves at the expense of others, and in order to place them in the same attitude as other witnesses, except as to the *credit* due to their testimony, which must always remain for consideration, it came to be a question, how such objection could be obviated; and it certainly appears, that formerly, in some cases at least, this was accomplished by the grant of an express remission of the crime. We see, accordingly, in the case of Nicholson of Tillicoultry, 7th December 1696, that the Lords demurred to the receiving *socii* as witnesses, unless the objection were removed by a remission, as was practised in the case of Salton's forfeiture: And on this scruple the Lord Advocate *superseded to insist* for some time, according to Lord Fountainhall.

But that the actual grant of remission was not always adopted, even during a great part of the last century, seems manifest from the case of Young, tried for forgery before the Court of Session, at the instance of the Royal Bank, with concourse of the Lord Advocate, 3d July 1750, where the objection to a *socius criminis*, (the most dangerous of the persons concerned in the crime, as noticed by Kilkerran,) *was taken and repelled;* but in order to affect his credit, he was allowed to be asked by the pannel, whether he had the promise of *a pardon*, to which he deponed in the negative; and there is no indication, from the Report, that a remission had either then been obtained, or was directed to be procured.

While accomplices must have continued to be received in other cases, the question of their *admissibility* was not again discussed, till the case of Macdonald and Jameson in 1770, when it does seem, that in answer to the objection, it had not been argued, that by being examined, the accomplice would *be exempted* from prosecution, but only that he might hope for impunity.

It is unnecessary to inquire, whether the answer that was thus made proceeded upon a correct assumption *of the usage and practice of the Court* at its date, or not; it only appearing that the objection was repelled, as the point came to be solemnly argued eighteen years thereafter, by the first abilities of the Bar, and the matter finally set at rest, by the solemn and deliberate judgment of the Court. This occurred in the noted trial of *Smith and Brodie*, in August 1788. I refer to the edition published by Mr Morrison, the agent for Smith, which does

not materially differ from that of Mr Creech; and the trial itself is referred to by Baron Hume. In that case, an objection was taken to the admissibility of Andrew Ainslie, an avowed accomplice, and whose evidence, along with that of another person in the same situation, was so decisive of the guilt of the accused. The objection was farther coupled with the allegation, that a bargain was made by the Sheriff with Ainslie, *to procure him his Majesty's pardon*, on condition of his accusing the pannels. The opinion of the Court was unanimous in repelling the objection,—and so clear was the law held to be, that the Lord Justice Clerk would hardly say a word upon it; but, in delivering his opinion, Lord Eskgrove, after adverting to the special circumstances of *the alleged bargain*, expresses himself in these words:—'I am likewise of opinion, that these do not go to his 'admissibility; for your Lordships will observe, that Ainslie 'cannot possibly be under any temptation now to accuse the 'pannel, in consequence of that bargain. If I understand the 'law, my Lords, the calling any person as a witness on a trial, 'is completely departing from any right to indict that person 'himself, as being guilty of the crime concerning which he 'is called as a witness.'

A more solemn adjudication, of any point of law, never was given on any occasion whatever. It has accordingly been held to settle the law ever since; and has been followed in innumerable instances, in this Court, and on all its circuits.

The fact is, that it appears from the record, which I have examined, that seven years prior to its date, in the noted trial of Dunn and Kay, before my Lords Justice-Clerk Miller and Gardenstone, for the robbery of Provost Hutchison of Ayr, *Henry Miller*, an avowed accomplice, and who had taken an active part in the crime, was, without objection, examined as a witness for the Crown, and gave most important testimony in the case, which terminated in the capital conviction of the pannels,—their counsel being a gentleman who was 'no granter 'of propositions,' inconsistent with the law, and who was lately a Judge of this Court. There is no trace in the record, however, of any remission or pardon having been then founded on, in regard to that accomplice.

But the judgment of the Court, in the case of Smith and Brodie, is of more importance, from another circumstance, which occurred, in regard to another objection taken to the other accomplice, who was also adduced against the prisoners. The objection of being an accomplice was not renewed as to him; but it was specially objected, that John Brown, *alias* Moore, had been rendered infamous, by a conviction and sen-

tence pronounced at the Old Bailey. That objection was answered, by the production of the King's pardon *for that particular crime*, and thereby doing away the infamy created by it. The answer was sustained by the Court; and while their attention was thus called to the effect of the pardon produced, their opinions in declaring that none, in fact, was necessary, in regard to the objection to the *socius criminis*, and that the mere act of giving evidence established absolute immunity, must be held to have the most decisive effect.

Whatever, therefore, may be the law of England upon this point, as it is laid down in Philipps and Russell, and fully expounded by Lord Mansfield, in the case of Mrs Rudd, which, however, differs from ours more *in form* than *in substance*, there certainly can now exist no doubt as to the rule of the Criminal Law of Scotland. According to the law of England, where an accomplice gives evidence, though he is not at the moment assured that he is, *eo ipso*, secure from all future trial; yet he is held so completely entitled to his pardon, that the Judge will admit him to bail, and, if it is attempted to try him, will stop the trial, till he has an opportunity of applying for a pardon. In our law, on the other hand, it has been fixed by solemn decision, and impregnable usage, that the act of giving evidence in a criminal trial, does, *ipso facto*, secure the accomplice from all prosecution or question for the crime or transaction with regard to which he has given evidence.

How the principle came to be adopted and acted on by the Court, it is superfluous to inquire; but, as noticed by Baron Hume, it is most likely that it arose from attending to the enactment of the 21 Geo. II. chap. 34, sect. 20.—That act for repression of thefts and depredations of cattle in the Highlands, provides, That in all trials, therefore, 'it shall not be 'allowed to be a good objection to any witness produced for 'proving such libel or indictment, that he was himself *particeps*, or *socius criminis*, nor shall the evidence given by such 'witness be made use of against himself, *nor shall he be liable 'to be prosecuted for his accession to the offence*, which he shall, 'as a witness, give evidence that the same was committed by 'the prisoner or pannel, in whose trial he shall be so adduced, 'or that such prisoner or pannel was art and part thereof, any 'law, custom, or usage to the contrary, notwithstanding.'

Though aware of the succeeding clause which has been referred to by Lord Pitmilly; yet, seeing that such was the declared will of the legislature in reference to the security thus afforded to accomplices in this particular crime, it was by no means unlikely that, when it came to be established in practice, that accomplices were admissible in all crimes whatsoever,

and the objections that were formerly sustained came to be disregarded, the Court should have been led to apply the same principle. by at last declaring, *that the fact of giving evidence in a criminal trial, did of itself afford complete indemnity to the accomplice.*

That the authority of the decision in the case of Smith and Brodie is in no degree weakened by any thing that took place in the subsequent trial of Downie for High Treason in 1794, is obvious from attending to the language both of the *Bar* and the *Bench* upon that occasion.

Mr Clerk, counsel for Downie, then maintained, that, 'in 'the Scots criminal Courts, when a *socius criminis* is ad- 'duced as a witness for the Crown, he is told by the Judge that 'his evidence will not militate against himself: and even, that 'by giving his evidence, he is secured from any future prose- 'cution upon the facts to which it relates.'

The opinions of the Lords President and Chief Baron, though supposed in the passages referred to in the respondents information, to narrow the privilege of an accomplice, cannot, upon an attentive consideration of them, lead to any conclusion which can detract from the weight of the decision in the case of Smith and Brodie. These eminent persons, though conversant with the duties of public prosecutor, had not themselves sat as Judges in this Court. It is from those, therefore, that so sat, and whose minds had constantly been directed to the subject, that an exposition of the law of Scotland was chiefly to be expected. Accordingly, Lord Eskgrove, the senior Judge of this Court, then present, did give an able and luminous opinion upon the point, part of which only is recited by the respondents; but the whole of which it is particularly necessary to attend to.

His Lordship said,—'I think it fit to say a few words on 'this subject, as being the senior judge (now present) of the 'Court of Justiciary, in which Court I have sat nine years, 'and had before attended it ever since I came to the Bar. 'I never doubted that the law of Scotland now stands as it 'has been explained, both by your Lordship and the Lord 'Chief Baron. In this country, and I believe in every coun- 'try which has a regular constitution and government, *socii* '*criminis* are admissible witnesses in trials for crimes; and, 'indeed, in many cases, justice could not be done, nor the 'greatest criminals convicted, without the aid of such evi- 'dence; accordingly, very few cases have been tried, at any 'time, of a complicated nature, in which many persons have 'been concerned, where *socii criminis* were not examined;— 'but I never knew an attempt made by the prosecutor to bring

'afterwards to trial for the same crime, any person who had 'been examined as a witness upon that crime, to which he had 'been accessary, and who had not refused to give evidence, 'but had given evidence. I had conceived a notion in my 'own mind, that if such an attempt should be made, the 'judges who are to determine upon the law of the land, as it 'strikes them, would not suffer a person so circumstanced, to 'be subjected to a trial; and, consequently, that it is not op-'tional for the public prosecutor to bring him to trial or not, 'for that the Court would interfere and prevent such trial 'proceeding, although that case has not yet occured. [Here 'the public prosecutor has thought fit to bring, by *sub pœna*, 'to give evidence, a person who, in the language of England, 'is an associate in the crime; and if that person should say 'nothing after he is sworn, it would not prevent him from be-'ing tried; but his giving evidence is the thing that must 'secure him. I did not, however, conceive, that the question 'now put to Mr Aitcheson could have led to the discussion of 'this point, because he formerly gave evidence in a case that 'was tried upon a charge for sedition, respecting what is 'called the British Convention, in consequence of having 'been told, that his giving evidence was to secure him 'from being tried for any crime, whether under the name of 'treason or sedition, arising out of his having been a member 'of the British Convention.] * I therefore think, there is no 'place for the objection in *his* case, and with respect to any 'other witnesses who may have been accomplices. I am of 'the same opinion with your Lordships: it is not competent 'for the prisoner's counsel to object, although the witness 'himself may decline to answer to questions, tending to 'criminate himself; but if he chooses to answer, and gives 'evidence, I conceive, he will be secure against any future 'prosecution.'—(State Trials, Vol. XXIV. p. 33).

It cannot fail to be here observed, how important this opinion is in the present question. It lays down in the most unqualified terms, that though brought forward as a witness in a trial for sedition, Aitcheson had an assurance of security against all trial, either for treason or sedition arising out of the proceedings of the British convention, as to which he had been examined; and which proceedings had, in fact, been brought forward in Downie's trial for high treason. This shows, in the clearest manner, that the security that is afforded to an accomplice when giving evidence, *is not to be narrowly or judaically interpreted.* If he fairly and openly answers the questions

* The passage within brackets, was omitted in the quotation of Lord Eskgrove's speech, given in the Information for the Wilsons.—Ed.

which are put to him,—if he readily discloses his connexion with the accused, and the transaction that is the subject of his trial,—if no attempt is made to keep back facts strongly militating against the witness himself,—and if such matters are disclosed as strongly bear upon other acts of the same crime, in which the parties have been engaged,—it is manifest, from the above opinion of my Lord Eskgrove, that the shield of the law is sufficient to protect such a witness effectually; and that it is contrary to the plainest maxims of justice and fair dealing, to allow him to be put into the jeopardy of trial for the concern he may have had in the transaction as to which he has given evidence.

That the same views of the law have subsequently been entertained and acted on by the Court, is demonstrated by the proceedings that took place *in the case of Dreghorn*, who was tried for murder in February 1807. I was myself the counsel for the prisoner, who took that objection, and was at first successful in persuading a majority of the Court, to reject a soldier, offered as a witness against the prisoner, upon the ground, that as he was himself implicated in the affray out of which the slaughter in question had originated, and was then in custody, by military authority, and liable to be tried by a court-martial, for a military offence, the Court could not protect him against the consequences of such prosecution; and, therefore, he was inadmissible as a witness, on the score of having a direct interest to criminate the prisoner. The like objection was renewed as to another witness; but having been fully debated, the majority of the Court concurred with the then Lord Justice-Clerk, in finding the objection was ill-founded; and declaring, that the fact of the witness having been examined on a criminal trial in this Court, was, of itself, sufficient to *protect him from any prosecution or trial, in any court whatsoever, on account of the transactions as to which he was examined;* and though a protest, somewhat irregularly, was attempted to be offered in Court, by Lord Cathcart, the Commander of the Forces, it was intimated, that while no such protest would be received, the warrant of the Court would be effectual for the entire security of the witness.

When this proceeding is fairly considered, it shews how strongly established our predecessors considered the protection of a witness in such a situation to be, and how broad and extensive in its effects, such protection truly is,—as the Court, in fact, directly negatived the power of another individual, and in a different tribunal, to molest by trial the witness who had been called on to give evidence in this Court.

It is unnecessary to notice how innummerable the cases are,

since we that are now sitting here have entered on office, in which the law so expounded has been declared and acted on; and the most solemn assurances given to accomplices, whose evidence went directly to affect the lives of pannels, that by the fact of their being called into Court, and giving evidence for the Crown, without any pardon having been produced, or directed to be applied for at the recommendation of the Court, they were for ever exempted from all prosecution, for any concern they may have had in the transactions that were the subject of investigation; and that the only risk they could run, was from their being guilty of perjury or prevarication.

It is a most important observation, as made by Lord Mackenzie, that though the rule and practice of this Court has been *notorious*, no man has ever called on the Legislature to interfere with them, as differing from the law of England. It can never be overlooked, that no instance has been, or can be pointed out, in which, when answering questions, an accomplice, though not coming up to the full expectation of the prosecutor, has been committed for the purpose of being himself tried; although instances of commitment for perjury or prevaricatiom, may often have occurred; which could only have arisen from the universal opinion, *that the rule of law was sacred and inviolable.*

It must farther be obvious, that this protection would, in reality, be in a great measure nugatory, were it to be held, that under an indictment, charging various acts of the same crime, it would be competent for the public prosecutor, after having availed himself of the evidence of an accomplice as to some of the acts, to stop short in his investigation of others, and then to turn round and prosecute the witness criminally. As such a proceeding would be contrary to the plainest principles of fairness and honesty, it would, undoubtedly, if attempted by any public prosecutor, be disallowed by the Court, as directly repugnant to the principles of the law, the witness having, in no respect, refused to perform, what he had been assured, would secure absolute safety.

There have not, however, been wanting cases, in which, if it had ever been supposed possible that the public prosecutor, after calling accomplices as witnesses, was still entitled to prosecute them for other acts arising out of the same transaction, as to which they had not fully given evidence, it might have been supposed desirable to resort to such a proceeding. On the 20th of March 1812, three persons were brought to trial in this Court, *charged in the same indictment with one act of murder, and ten acts of street robbery.* In support of the charges of robbery, all of which, and particularly *the 10th*, were

not investigated at the trial, three avowed accomplices were examined as witnesses. And while they gave most important evidence, as to the concert and arrangement of those concerned in the transactions of the last night of the year 1811, and the various assaults and acts of robbery committed upon the public streets of this city, in the participation of which they fully acknowledged their shares,—the trial having resulted in the conviction of one of the pannels of the murder, and all the three of *two* of the acts of robbery,—no attempt was ever made, nor did it enter into the imagination of the learned person now near me, who then represented his Majesty's Advocate, to turn round upon those notorious offenders and raise an indictment against them, either for the charges in that indictment, which were not then investigated, or for any other of the many acts of crime that were known to have been committed upon that memorable occasion; and, with regard to which, there was nearly as great an excitement in the public mind as on the present occasion. This case, therefore, affords a strong illustration of the practice that has followed, wherever it has been deemed necessary, as in the present case, to resort to the evidence of accomplices for the ends of public justice.

I have entered into the discussion of the state of the law upon this point, at so much length, for the purpose of shewing the situation in which a person, such as *Hare* is, now stands in relation to the public prosecutor.

It does not appear to me, however, that the protection which he enjoys from prosecution for any concern he may have had in any of the murders charged in the indictment raised against Burke and M'Dougal, either is, or can be, rested merely upon the compact entered into between him and those acting under the authority of his Majesty's Advocate. It is not the Lord Advocate who can be said to exercise the power of pardon, in such a case as this, without the accompanying fact of his afterwards adducing him as a witness. The compact with his Lordship, and the assurance the witness received, no doubt laid the foundation for what was afterwards perfected, by his being brought forward and examined as a witness in the trial, under the peculiar circumstances of an indictment, so knit together, and special in its nature, as that on which he was summoned to give evidence. His giving the evidence he did, in the presence of the Court, completed, in my opinion, his indemnity, and rendered it impossible for the public prosecutor, (if he could ever be supposed to be actuated by views and intentions directly the reverse of those which in reality influenced his conduct), to turn round, after the conviction of Burke, and indict the witness for his concern in either of the acts, the trial

of which had only been postponed at the earnest desire of the prisoners.

2d, If such, then, is the law in regard to his Majesty's Advocate, when prosecuting for the benefit of the whole community, it remains to be considered, whether the respondents, the nearest-of-kin of James Wilson, a person charged in the indictment against Burke to have been murdered by him in the house of William Hare, can, notwithstanding the examination of Hare as a witness, still bring him to trial for the murder of their relation.

Admitting, to the fullest extent, the right of a private party to prosecute for the murder of his near relation,—a proposition which cannot seriously be contested, though he must exercise his right under a variety of trammels from which the public prosecutor is altogether free,—it appears quite manifest, that if the right now claimed by the respondents is rested on the alleged inviolable privilege of private parties to prosecute for crimes, independently of all interference or attempt to compromise their privilege by the public prosecutor, by whose acts they cannot be affected;—that this plea must be equally available to the nearest of kin of Docherty, and who must also be entitled to bring Hare to trial for his share in that foul transaction. If the supposed unqualified right of private prosecution, unfettered and unrestrained by any proceeding of the public prosecutor, acting under the eye of this Court, is the foundation of the claim thus asserted, there is no possibility of escaping from the conclusion, that the right of the relations of Docherty is equally undeniable with that of the respondents.

It seemed, however, to be conceded, upon the part of the senior counsel for the respondents, that the relations of Docherty could not maintain their right to prosecute Hare for her murder; but this could proceed only from the admission, that the mere fact of his having given evidence for the Crown, had operated for him an entire exemption from prosecution.

If this then is undoubted law, it follows, necessarily, that by the public prosecutor having selected the accomplice, and used his evidence upon the trial, he did thereby necessarily deprive private parties of the right, which, but for his proceeding, they undoubtedly would have had to prosecute.

That this is an unquestionable abridgement of the right of private prosecution, which it is necessary to submit to for the ends of public justice, is demonstrated, by again reverting to the special enactment of the statute, 21st Geo. II., chap. 34. That act expressly provided, *that no person giving evidence, in*

regard to the crimes therein mentioned, shall be prosecuted for his accession to the offence, with regard to which he should give evidence. Now, if the possibility of the private party injured being entitled to prosecute criminally, notwithstanding the unequivocal terms of this enactment, had ever been supposed to exist, it is utterly impossible to conceive that the Legislature would have passed such an act, which was to affect the interests of the whole Highland population of Scotland. It would, in truth, be to suppose that the Legislature had lent itself to the formation of a snare for entrapping those who had come forward in reliance upon its own act. But, on the contrary, as it must be held that the true meaning of the act was to declare all criminal prosecution incompetent, it amounts to a positive declaration of the Legislature, that the right of private parties must bend to the interests of the public at large.

They are, however, made to bend, in other respects, to the same interests, as the public prosecutor has the undoubted right of restricting any indictment, at any stage of the proceedings, previous to pronouncing sentence,—a privilege that has arisen from usage alone. If, again, he has taken the lead, and raised an indictment, in which he happens to fail from the most purely accidental mistake or blunder, no subsequent trial for the same offence or criminal act, though attempted to be shaped as a different charge, can ever be instituted by the private party. Many other illustrations of this have been given by Lord Mackenzie, which I shall not repeat. There are no doubt private interests, in regard to which, it may justly be held, that the acts of the public prosecutor cannot interfere,—such as claims of assythment, and pecuniary reparation, arising out of criminal acts. These, it is held by our authorities, an actual pardon or remission cannot cut off; and, in the case of Linwoods *against* Graham and others, an action of that nature, in 1816, was actually raised against a person who had been acquitted on a charge of culpable homicide, and its relevancy not disputed. This is laid down by Mr Burnet, at p. 463, in terms which clearly shew the conviction of the learned author, that any idea of a criminal prosecution being competent at the instance of a private party against a *socius criminis* who had given evidence, was altogether out of the question.

But it has been well observed by my brother on my left hand, that the relations of Docherty have an equal claim to assythment as those of *Wilson;* and yet it is conceded they are debarred from prosecuting criminally.

If, then, the prisoner Hare is legally exempted from all

prosecution at the instance of the public prosecutor, for any accession he may have had to the three acts of murder charged in the indictment against Burke and M'Dougal, there seems no ground in law for maintaining, that he may still be prosecuted at the instance of the relations of either of the three parties alleged to have been murdered.

As to the *specialty* attempted to be founded on, as to his not having been examined with regard to the actual murder of *James Wilson*, it has already been sufficiently adverted to, in reference to the supposition of the Lord Advocate attempting to prosecute for that offence. The nature of the indictment,—the interlocutor, finding the whole charge relevant,—and the almost identity of the modes of slaughter and intent with which the *three* acts were perpetrated, and the general nature of Hare's evidence,—have already been pointed out, as demonstrating, that without a total departure from the fairness and justice that must ever characterize judicial procedure, it is impossible to deny that Hare did mix himself up with matter that had the closest affinity to the other acts, the trial of which did not proceed at the time.

It is further to be recollected, that in the list of witnesses there stand included various persons connected with the death of Wilson, the discovery of whom we have the assurance of the public prosecutor, was made through the information of Hare alone, who did also make such disclosures as led to the framing of that, and the other charges in the indictment. It is utterly impossible, therefore, to view Hare as a person who had not spoken out, or given *any evidence*, relative to the crime for which he is now attempted to be tried. He can, by no possibility, be replaced in the situation in which he formerly stood. *Things are no longer entire with regard to him*, as has been justly said. The public has derived the benefit that was expected from his evidence, by the conviction and execution of his guilty associate; and that public faith, that was pledged to him, in the face of the country, and confirmed by the intervention of the authority of this Court, must be preserved inviolate.

Such is the deliberate opinion that I have formed, after the most careful and anxious consideration of all that has been urged, both in speaking and in writing, upon this important question, and a careful review of the authorities that appeared to bear upon it. The same opinion I formerly delivered in a most important stage of the trial of Burke and M'Dougal, with the concurrence of my brothers, who were then sitting with me.

I am free, however, to admit, that notwithstanding this circumstance, it was my bounden duty to reconsider that

opinion, with all due attention to the able and elaborate argument that was offered against it by the respondents' counsel. I cannot, however, agree with them, that the opinion to which they objected, and were well entitled to object, was one of an *obiter*, or passing nature, and not to be considered of importance, at the stage of the trial when it was pronounced. It was, upon the contrary, delivered to the Jury, as the opinion of the Court, upon an objection urged in point of law, in the most earnest manner, by the counsel for the prisoners, and which, if well founded, must have gone to the destruction of the credit of the accomplices who had given evidence.

There can be no part of the duty of the Judge who presides at a criminal trial, more sacred, than that of expounding the law to a jury, in reference to such an objection; and it was necessary, therefore, that the opinion of the Court should be given in the most unequivocal terms. It was accordingly given to the purport and effect that is stated in the printed trial.

As no man can say what effect that statement of the law had upon the minds of the jury,—as it may, in fact, have led them to give such credit to Hare and his wife, as actually brought about their verdict against Burke,—and consequently that his fate had been decided by it,—I have no hesitation in declaring, that if I had, upon reflection, been convinced that I had committed an error, and delivered an erroneous opinion in law to the jury, I should have felt it to be my bounden duty, without the least regard to popular feeling or clamour, to have made such a representation to the Secretary of State, as might have led to an alteration of the sentence of the law upon Burke. The opinion however, which I did deliver, in my charge to the jury, so far from being shaken, has been strengthened and confirmed by all that I have since heard or read upon the subject.

I shall only add, that if the objection to the credit of the accomplices, upon the ground of their being actually liable to be tried for the two acts of murder contained in the indictment, —the trial of which had that day merely been postponed,—had been taken, as it ought to have been, when Hare and his wife were offered as witnesses, the point would have been fully argued, and solemnly determined by the Court. But as it was withheld till the addresses to the Jury, every one knows, that it could no otherwise have been disposed of than by delivering an opinion upon it to the Jury.

I have but one more word to add, with regard to the supposed inconsistency between the opinions expressed by myself and my brothers, in regard to a question proposed to be put to

Hare, and that which I delivered to the Jury. I must beg leave, however, to say, that when the real *res gestæ* are attended to, no such inconsistency can be found. I find from my notes, that the argument of the counsel 'was raised upon the 'question, *if Hare ever was concerned in the commission of* '*other murders?*' Upon the competency of that question the opinions of the Court were delivered; and these opinions must necessarily be viewed as having reference to the question actually proposed, and the injunction which the pannels' own counsel had themselves desired should be given to Hare, to confine himself to the case of Docherty. And I well recollect of putting it to the counsel, that the witness must be fairly dealt with, and of having stated, that if asked in regard to the cases of Wilson and Paterson, his whole statement must be given, whatever the consequences might be.

When the examination was resumed, I do not find that the question is put in the precise terms on which it had been argued; and it was only at a later period that Hare was asked, if there was a murder committed in his house in October last? But as to which the opinion of the Court was not delivered.

Whatever shade of difference may therefore appear in the opinions, regarding these questions, and that which was advisedly delivered in the charge to the Jury, and I am by no means surprised it has so struck some of your Lordships, must fairly be ascribed, either to the imperfections of the report of the trial, or to the course of proceeding that was adopted at the suggestion of the counsel for the prisoners.

I am, upon the whole, of opinion, that the prayer of the prisoner's bill ought to be granted; and that it would be directly contrary to the established practice of this Court, and the principles of our law, merely to suspend the proceedings against him, in order that a pardon should be obtained for his concern in the offences charged in the indictment upon which he was examined as a witness. Such would be the course adopted by the Judges of England; but respecting, as I do, that law, and its institutions, I do not, as a Scottish Judge, feel myself warranted to follow it on the present occasion.

My opinion is, that it would be equally incompetent to the first officer of the Crown, as it is to the private parties now before us, to institute any criminal procedure against Hare, steeped in guilt although he be, in reference to the facts contained in the indictment against *Burke*; and I can allow that opinion, in no degree, to be influenced, *civium ardore prava jubentium*.

The Court pronounced the following judgment:—

The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of the bill of advocation, suspension, and liberation, for William Hare, with the Informations given in for both parties, in obedience to the order of Court of the 26th January last, and Answers given in for His Majesty's Advocate, in compliance with said order; Pass the bill; advocate the cause; and in respect that the complainer, William Hare, cannot be criminally tried for the crime charged in the warrant of commitment, therefore, suspend the said warrant, and ordain the Magistrates of Edinburgh, and keepers of their Tolbooth, to set the said William Hare at liberty; and discharge all farther procedure in the precognition complained of; and ordain the said precognition, in so far as it has already been taken, to be delivered up to the Clerk of this Court, in order to the same being sealed up, to abide the farther orders of this Court, and decern.

(Signed) D. BOYLE, *I. P. D.*

Immediately after the Court had pronounced the above judgment, finding it incompetent to prosecute Hare criminally, the private prosecutors presented the following Petition to the Sheriff, narrating their intention to prosecute him civilly for an assythment, for the murder of *Daft Jamie*,—stating he was *in meditatione fugæ*, and craving his detention in Jail till he found caution *de judicio sisti*.

Unto the SHERIFF of the County of Edinburgh, the PETITION of JANET WILSON, Senior, and JANET WILSON, Junior;

Humbly sheweth,

THAT William Hare, presently prisoner in the tolbooth of Edinburgh, is a native of Ireland, is justly addebted and owing to the petitioners, in the sum of £500, or such other sum as shall be modified by the Court of Justiciary, or any Court competent, as an *assythment* due to them by the said William Hare, for having, the day of October last, or one of the

days of that month, in conjunction with the late William Burke, who was executed for the murder of Mary or Marjory Campbell, committed the crime of murder, upon the body of their near relative, Janet Wilson, and that they are informed, and have reason to believe, that the said William Hare, who is now in prison, but about to be liberated by warrant of the Court of Justiciary, is *in meditatione fugæ*, and about to leave Scotland, for the purpose of returning to his native country, and of defrauding the said petitioners of their just claim, and that the petitioners are ready to make oath to such belief.

May it therefore please your Lordship, to take the petitioners' oath, and upon their deponing to the verity of the said claim, and to their belief of the said William Hare's being in meditatione fugæ, *and to sufficient grounds of such belief, to grant warrant for bringing the said William Hare before you for examination; and thereafter, upon his* meditatio fugæ *appearing, to grant warrant for imprisoning him till he find caution to answer the said claim of assythment at the instance of the petitioners,* de judicio sisti et judicatum solvi, *in any action of assythment to be brought against him at the instance of the petitioners, within six months from the date of such caution.*

According to justice, &c.

E. D. SANDFORD.

Upon this application the Sheriff pronounced the usual deliverance; and thereafter, Daft Jamie's mother and sister gave the following oath of verity:—

At Edinburgh, the 2d day of February 1829.

In presence of GEORGE TAIT, Esq., Sheriff-substitute of Edinburghshire,

Compeared JANET WILSON senior, and JANET WILSON junior, who being solemnly sworn and examined, depone, That what is set forth in the petition is true: That the said William Hare is justly addebted, resting, and owing to the deponents, the sum of £500 sterling, or such other sum as shall be modified

by the Court of Justiciary, or any Court competent, as stated in the petition: That the deponents are credibly informed, and believe in their conscience, that the said William Hare is in *meditatione fugæ*, and about to leave this kingdom, whereby the deponents will be defrauded of the means of recovering said sum: That the grounds of their belief are, that Hare was born in Ireland: That a short time ago he was imprisoned for examination, preparatory to a trial upon a charge of murdering James Wilson, of which they have no doubt he was guilty: That owing to certain circumstances, he has not been brought to trial for that offence, and there is reason to believe that he will speedily be liberated from custody; and owing to the prevailing belief of his guilt, and the popular indignation which has in consequence been raised against him, it is impossible that he can, with safety to his life, remain in Scotland, particularly as he has been suspected to be guilty of other murders; and, therefore, they have no doubt, that as soon as he shall be liberated from custody, which they believe will be this evening, he will use utmost and immediate exertions to escape from Scotland to Ireland. All which they depone to be truth, as they shall answer to God. And the said Janet Wilson, senior, depones that she cannot write.

(Signed) { JANET WILSON.
G. TAIT.

Thereafter, the following procedure took place:—

Edinburgh, 2d February 1829.

Compeared WILLIAM HARE, at present in custody, who being examined and interrogated, Whether he was concerned in killing James Wilson, otherwise called 'Daft Jamie?' declares, That he will say nothing about it. Interrogated, Where he was born? declares, That he will have nothing to say more about it. Interrogated, If he has any trade in Edinburgh? He remained silent. And being interrogated, Where he would go if he were to get out of Jail now? He remained silent. And being interrogated, If he is afraid that the mob would kill him if he got out? He remained silent. And being interrogated, If he means to go to his native country, understanding it to be Ireland? He remained silent. Interrogated, If he has any prospect of employment in Scotland, or what he would do if he remained in Scotland, and if he has any property? He remained silent. And being interrogated, Whether he can write?

declares, That he cannot. And the declaration being read over to him, and he being interrogated, Whether it is correctly taken down? He remained silent.

(Signed) G. TAIT.

GEORGE MUNRO, for the petitioners, now moved the Sheriff, in respect of their oaths, and of the examination of the debtor, that his Lordship would be pleased to grant warrant of commitment, until caution was found, as prayed for in the petition. It was expressly set furth, that a debt was owing,—that the debtor was a foreigner, as well as a murderer, at least he was accused of the crime of murder,—and that he was about to fly from this country, in order to defraud the petitioners of their debt, or claim of assythment. The truth of the facts set furth in the petition were expressly sworn to by the petitioners: And farther, that they believe if the defender is liberated, (and there is no warrant against him,) that he will use his utmost and immediate exertions to escape from Scotland to Ireland. He also submitted to the Sheriff, that this is a very peculiar case, and did not, and could not, admit of distinct and *specific* proof of intention to fly; but the examination of the debtor himself was also of a peculiar nature, and, he submitted, was quite conclusive that this party, by his silence and unaccountable conduct, clearly shewed that he was a dishonest debtor. He would not even acknowledge his birth place, his prospects, or his intentions, far less whether he had any property. On these grounds, it was submitted that the Sheriff would grant warrant of commitment, *de judicio sisti*, if not, *judicatum solvi*. If it should have any weight with the Sheriff, that it was not proved that this party was a foreigner, proof of that fact was now offered; and he further offered to prove, that this person not only admitted that he was going to Ireland, but that he actually admitted that he killed Daft Jamie.

(Signed) GEO. MUNRO.
G. TAIT.

The Sheriff allows to the petitioners a proof of all facts and circumstances, tending to shew that William Hare is *in meditatione fugæ* from Scotland, and to the said defender a conjunct probation; and to both parties a diligence against witnesses; and appoints the proof to proceed forthwith.

(Signed) G. TAIT.

Compeared WILLIAM LINDSAY, at present a prisoner in the tolbooth of Edinburgh for trial, who being solemnly sworn,

purged of malice, partial counsel, and interrogated, depones, That he has known the defender Hare for two months back; and depones, That Hare told the deponent that he was by trade a labourer, and sold swine and herrings; and he did not say that he dealt in any thing else. Depones, That Hare told the deponent, that he was a native of Ireland, and said he had been several years in Scotland, and Hare said he was here two or three years before the King came: That he said two or three days ago, that he expected to be liberated, if the case was settled to-day, and he said that he would leave this and go home to Ireland immediately. All which he depones to be truth, as he shall answer to God.

(Signed) WILLIAM LINDSAY.
G. TAIT.

Compeared JOHN FISHER, head turnkey, Calton Jail, who being solemnly sworn, *ut antea*, and examined, depones, That Hare told the deponent that he was born in Ireland; and since the trial of Burke, he has said to the deponent, that he would go back to Ireland, on his liberation. All which he depones to be truth, as he shall answer to God.

(Signed) JOHN FISHER.
G. TAIT.

And it being stated to the defender, that if he intended to remain in Scotland, any witnesses whom he might wish to adduce to prove that fact might now be examined, he stated that he had no money, and he must go somewhere to get work: That he had now no domicile in this part of the country, and could not remain in Edinburgh: That he did not say positively that he would go to Ireland, but that he might go to Ireland; and he states that he does not know whether he will remain in Scotland, or whether he will go to Ireland or England in quest of employment, and therefore, he has no witnesses to prove that he intends to remain in Scotland, and he states that he cannot write.

(Signed) G. TAIT.

Edinburgh, 2*d February*, 1829.

The Sheriff-substitute having resumed consideration of the petition, with the oaths of the petitioners, defender's declaration, proof adduced on the part of the petitioners, and whole procedure; Grants warrant to officers of Court to apprehend the therein-designed William Hare, and incarcerate him in the tolbooth of Edinburgh, the keepers whereof are hereby ordered

to receive him, and detain him, aye and until he finds sufficient caution, acted in the Sheriff-court books of Edinburgh, *judicio sisti*, in any action to be brought within six months from this date against the defender, in any competent court, for payment of the sum mentioned in the petition.

(Signed) G. TAIT.

The above warrant was afterwards withdrawn, and Hare was set at liberty on Thursday evening, the 5th February 1829, and he immediately fled to England.

APPENDIX

TO THE

TRIAL

OF

WILLIAM BURKE AND HELEN M'DOUGAL,

24th December 1828.

THE Publishers of the *genuine* edition of the Trial of BURKE and M'DOUGAL having thought that a selection of the principal and most authentic accounts relative to the late WEST PORT MURDERS, and of the best commentaries upon these atrocious transactions, as they appeared in the public journals, would form a very interesting APPENDIX to that Trial, and the subsequent proceedings against Hare,—the following most prominent circumstances and remarks have therefore been thrown together, in the hope that they will be found to contain (though in some instances possessing considerable similarity in detail) the leading features of this most extraordinary case. It may be observed, that no notice is taken of the subject anterior to the Trial.

1. As the intense excitement produced by the disclosures made in the course of the late trial has in no degree subsided, and as the public must be desirous to learn every thing that can be gleaned respecting the West Port tragedies, or the actors in these horrid scenes, we throw together a few particulars which we have collected, and which, at the present moment, can scarcely fail, we should think, to prove interesting to our readers. The following is an authentic narrative of the circumstances attending the apprehension of Burke and his infernal gang.

On Friday the 31st of October, a little elderly woman was seen begging about the West Port: she entered the shop of Mr. Rymer, near to Burke's house, to ask charity, while Burke was there purchasing whisky. He seems to have immediately fixed upon her as a fit subject for his atrocious purposes, and endeavoured to decoy her

into his power. He asked her name, and what part of Ireland she came from; and upon receiving her answers, replied that he was from the same place, and that she must be a relation of his mother, whose name was Docherty. He then promised to give her breakfast; and they left the shop together, and were seen to enter Burke's house. She was afterwards seen in the house at different times during the day; and two lodgers, Gray and his wife, were sent to Hare's house, to make room for her, under the pretence that she was a friend newly come from Ireland. They were afterwards seen making merry, drinking and dancing in company with Hare and his wife, first in the house of Ann Connaway, and afterwards in Burke's. During the night, a great noise of quarrelling and cries of murder were heard in Burke's house; but the neighbours, knowing that two men and three women were in the house, and having frequently heard similar uproars, did not think much of it, nor interfere. One of them, however, had the curiosity to look through the key-hole, when he observed Helen MacDougal holding a bottle to the mouth of the woman Campbell, and pouring whisky into her mouth. Then all was quiet for a little. Shortly after this, however, the noise recommenced, and was again succeeded by silence. At this time, that is between eleven and twelve o'clock, the horrid deed was perpetrated.

In the morning, M'Dougal, who passed for Burke's wife, accounted for the absence of Campbell, or "the little woman," as they called her, as well as for the noise, by saying that the latter had, during the night, made too free with her husband, Burke, and that she had kicked her out of the house: and this seems to have allayed any suspicions. In the morning, the lodgers, Gray and his wife, returned to Burke's; but upon Mrs. Gray attempting to search about the bed, and the straw under it, for some articles she had left, she was ordered by Burke, with an oath, "to keep out from them." Burke afterwards left the house, desiring Broggan, a carter, who was there, to sit on a chair close to the straw, and not to stir from that position until he returned. Broggan, however, followed him in a short time; and M'Dougal, who appeared to be in liquor, started up from the bed asking for her husband, and afterwards quitted the house, leaving Gray and his wife sitting in it. Mrs. Gray then commenced searching for her child's stockings and cleaning the house; and from the suspicions which had been excited by Burke's conduct, she examined the straw, and found the murdered body, which her husband pulled out, and which they immediately recognised to be that of the woman Campbell. On going up the stair, they were met by M'Dougal, whom Gray informed of the body being found. M'Dougal, however, affected to pass it off as if the woman had died in consequence of a drunken frolic, and attempted to bribe them into silence by offering them money. She invited Gray and his wife to take a dram in a neighbouring public-house, where she, along with Hare's wife, hurriedly left them; and upon their return to Burke's, in two or three minutes afterwards, they called the people next door to come in, as they wished to shew them something; but upon examination the body was gone. They immediately lodged information at the police office, and a party of policemen were sent; but notwithstanding the most diligent search that could be made, the body could not be found,

nor the parties implicated. At this time a servant girl, who lived opposite, informed them that she had seen Burke and his wife, Hare and his wife, and the porter M'Culloch, going up the stair, the porter carrying a tea-box with the top stuffed with straw; and that she had laid her hand upon it and found it soft. Upon the return of the policemen, some time afterwards, Burke came in, it is supposed, to get some things previous to escaping. He was pointed out by Gray, and immediately seized. He seemed to wish to laugh it off, under the pretence that it was the lodgers who wished to do him an ill turn, saying that he defied all Scotland to charge him with any thing wrong. Mrs. Burke then came in, bawling out that she heard the police were after her husband about the old woman, but that it was all a drunken spree, and used a great many capers and dry laughs. She was also immediately taken into custody, and both were conveyed to the police-office.

There were still no tidings of the body, when it was suggested that the dissecting-rooms should be searched; and Lieutenant Paterson and Serjeant-major Fisher went on Sunday morning for that purpose. They were informed by Paterson, Dr. Knox's man, that only one body, which was shewn them, had been received, but from their not having seen Campbell, they could not identify it. Gray and his wife were sent for, who soon recognised it; and after procuring a warrant, it was conveyed to the police-office.

Early on Sabbath morning, instructions were received to apprehend Hare and his wife, and a party proceeded to his house about eight o'clock, and were informed that they were both in the house, and in bed. Upon informing him that Captain Stewart wished to speak with him upon the subject of the body that had been found in Burke's, Mrs. Hare, laughing, said, that the captain and the police had surely very little to do now to look after a drunken spree like this, repeatedly jeering and laughing. Hare then said to her, that he was at Burke's and had a dram or two, and likely they might be attaching some blame to them, but he did not care for Captain Stewart, and they had better rise and see what they had to say. They were both conveyed to the police-office, and immediately lodged in separate cells.

2. We observe it stated, that Hare has, since the trial, made important disclosures, in which he confesses having been concerned in no less than twelve different acts of murder, in some of which he was the principal, in others an accessary; and that he knew of another, though he was not in any way a party to the commission of it. We see no reason to question the correctness of this statement. The wretch is evidently disposed to be communicative, and, had he been permitted, we have little doubt that he would have revealed as much in the witness-box. But the public may expect still more astounding disclosures. We have learned from good authority, that Burke admits having sold in all (we shall not say to whom) from thirty to thirty-five *uninterred* bodies during the last two years. His counsel, indeed, assumed, in the course of the very able pleadings for the defence, that he was by trade a resurrectionist, a body-snatcher, one whose profession it was to furnish *materiel* for the dissecting-room; and arguing upon this assumption, they contended that the ordinary pro-

sumption arising from the fact of a dead body, with marks of violence upon it, having been found in the possession of the pannel Burke, could have no place in the case of an individual who pursued this disgusting traffic, and whose business it was to deal in dead bodies. But, as we stated on a former occasion, when the fact of these horrid atrocities having been committed first transpired, Burke was *not* a resurrectionist; and our reason for then hazarding this assertion was, that he was utterly unknown, either by appearance or name, to any of those who pursue this trade in what may now be called the *regular* and *legitimate* way, viz. by disinterment alone,—and that he could not, by possibility, have carried on such a traffic without being known to the other members of this infamous craft. They are all leagued together; they all know one another; and they suffer no interloper to interfere with their business, or to pursue it exclusively on his own account.—The circumstance of Burke's being unknown to them, therefore (which we learned from undoubted authority), we considered as almost decisive of the *mode* in which *he* had been accustomed to obtain or to *make* subjects; and, accordingly, the wretch has now admitted that he was *not* a resurrectionist—that neither Hare nor himself were ever by the side of a grave in a churchyard for the purpose of plundering it—and that the bodies they disposed of were bodies *which had never been interred*. If it be true then, as Burke now states, that in the course of the last two years, he sold to one individual from thirty to forty uninterred bodies, the conclusion is inevitable, that he and his associates must have committed *as many murders!!!* Nor are there wanting other circumstances tending to corroborate this terrific suspicion, to give it no stronger epithet. It has been remarked that numbers of the unfortunate females upon the town have lately disappeared, no one knew how. Natural deaths have become rarer among that class; and for some time past the interment of one of them has scarcely been heard of. Abandoned by the relatives and friends whom they dishonoured, and excluded from all notice or regard by the virtuous part of society, there was none to care for, and none to inquire what had become of them. Connecting this circumstance with the *exuviae* found in the den of murder occupied by Burke, we confess our conviction has been strengthened that the greater number of his victims were selected from this unfortunate and degraded class. The girl Paterson or Mitchell was one of them, but not the only one; and she was murdered in the house of his brother, Constantine Burke. In Burke's own house, however, there are still appearances visible, which must impress every one with a persuasion that others besides Docherty have been sacrificed under the same roof. Bloody straw in a corner, a heap of bloody clothes on the floor, and a pile of old boots and shoes, amounting to several dozens (for which the miscreant's pretended trade of a shoemaker can never account), seem to us strong indications that the den of the monster, now so justly condemned to die, has been the scene of manifold murders. Many persons have been to see this horrid place, and all have left it impressed with the same conviction. An eminent literary character, who also visited it, admits we understand, that even his imagination, with all its richness, fertility,

and power, could have pourtrayed nothing at all equal to the dreadful realities of Burke's residence. The robbers' cave in Count Fathom, loses all character for the horrible compared with it.

The conclusion to which all these circumstances lead is as obvious as it is appalling; and to strengthen it, we shall here introduce a statement which we lately received from a medical friend, and which may be relied on. About six months ago, the body of a female was offered for sale by some miscreants, probably of Burke's gang, to the assistant of a most respectable teacher of anatomy here. The ruffians offering it for sale were not known to him, and were no resurrection-men; but as a subject was required, he said he would take it, if it suited him when he examined it, and asked when they could fetch the body. They replied that they had it now, and that they would bring it to the dissecting-room in the evening, between nine and ten o'clock. At the appointed hour, accordingly, they made their appearance, accompanied by a porter, with the body in a sack. It was taken in, of course, and turned out of the sack, when it proved to be the body of a female, as had been stated by the ruffians—a woman of the town in her clothes, and with her shoes and stockings on. The assistant was startled, and proceeded at once to examine the body, when he found an enormous fracture in the back part of the head, and a large portion of the skull driven in, as if by a blow from the blunt part of a hatchet, or some such weapon. On making this discovery, he instantly exclaimed, "You d——d villains, where, and how did you get this body?" To which one replied, with great apparent *sang froid*, that it was the body of a ——— who "had been *popped* in a row (murdered in a brawl) in Halkerston's Wynd," and that if he did not choose to take it, another would. The assistant then proposed to them to wait till he sent for his principal, his intention being to have them detained; but not relishing this proposal, the ruffians, three in number, besides the porter, immediately withdrew with their horrid cargo, and, doubtless, soon found a less scrupulous purchaser. Such is the statement that has been made to us, accompained, at the same time, with an assurance that occurrences of this nature are, or at least have been, by no means rare.

Now, we ask, do not facts like these call loudly for investigation? We are satisfied that the public do not yet know a tithe of the truth, and that there are still hid more horrid things (if, indeed, that be possible) than those which have been revealed. An investigation of the most searching kind is due alike to the public, and to the teachers of anatomy themselves, many of whom are suffering most unjustly from the odium which the late disclosures are calculated to throw on the necessary and indispensable science which it is their business to teach, and which we know they have taught in a manner which, if known, would prove equally creditable to themselves and satisfactory to the country. All the anatomical teachers, therefore, and others who use *cadavera* for their classes, both within and without the University, ought to be examined as to the manner in which they are accustomed to receive their subjects. And, in particular, the students and assistants (during the last two sessions) of one gentleman whose name has unfortunately been too much mixed up with the late proceedings, ought to undergo an examination as to the quarter whence bodies were

procured—the state in which they were received—the manner in which they were dissected, &c. This we think indispensably necessary for the vindication of the teachers of anatomy themselves, as well as for allaying the excitement which at present exists in the public mind. Several of these gentlemen, we know, have acted with the most consistent and anxious scrupulosity in regard to the reception of subjects; and have admitted none into their rooms without a thorough knowledge of the *mode* in which they were procured, without being perfectly certain that they were disinterred bodies, which had died a natural death. But the public can have no authentic and satisfactory knowledge of this without a full and complete investigation; they can have no guarantee that every anatomical teacher in Edinburgh has not a Burke in his pay at this moment. The present impression on the minds of the people is, that one gentleman stands in the same relation to Burke that the murderers of Banquo did to Macbeth. This impression, we believe and trust, is ill founded; but the fact of its existence, which cannot be disputed, should induce him to demand an inquiry; and the other teachers ought also to demand it, in order to vindicate their reputation from the foul suspicions which attach to it in the popular mind. For the honour of a most respectable profession, for the public safety, for the character of the country, for the credit of its laws, and for the sake of humanity itself, the Public Prosecutor ought to interpose, and have this matter probed and sifted to the very bottom. It is not enough that one, or perhaps two, of the guilty instruments in this traffic of murder are brought to condign punishment; it is not enough that a portion of the horrid reality has been disclosed, or that the ministering demons in the work of carnage are detected and known; the public has a right to know the whole extent of the system, and all who have in any way been concerned in it; they have a right to know who are guilty, and who are innocent; and it is due to an honourable and useful profession that the latter should be completely vindicated from the foul and intolerable suspicions which have unjustly attached to them, and which are calculated to do equal injury to their reputation, their usefulness, and patrimonial interests.

3. In the *Sun* newspaper of Thursday last, there are some observations on the West Port tragedies, to which we think it necessary to direct the attention of our readers. From the date of them, it is of course evident that the London scribe, when he penned the remarks on which we are about to animadvert, could have known nothing further of the subject on which he writes than was to be gleaned from sundry paragraphs that from time to time appeared in the Edinburgh newspapers,—that is, in truth, nothing at all. But although he *must* have been in total ignorance of the facts, he is not the less positive that he knows all about the matter; and, accordingly, he favours us with some specimens of his ignorance, presumption, and talent for abuse, which cannot fail to amuse *our* readers.

"The Scotch character (quoth the Luminary) *is amusingly developed* in the comments made by the different Edinburgh and Glasgow papers on the subject of the late West Port murders. *Each journal seems to think its own honour implicated in the business*, and *hastens to prove*,

first, that Burke and his wife are both Irish; and, secondly, that the idea of cutting people's throats for the sake of selling their bodies to anatomists, is far too original for the *inferior* conceptions of Scotchmen."

"The Scotch character is" much more "amusingly developed" in this paragraph than in any of the comments made by the Edinburgh or Glasgow papers; for it bears to be an editorial lucubration, and as such must proceed from an exported Invernessian, who seems to be ashamed of his country, very probably because his country had some reason to be ashamed of him. It is false, however, that any Edinburgh journal ever dreamt "of its own honour being implicated in the business," or "hastened to *prove* that Burke and his wife (concubine) are both Irish." Our contemporaries, like ourselves, stated such facts as came to their knowledge, without ever imagining the nonsense which this blockhead thinks proper to ascribe to them; in fact, they appeared much more anxious to express their horror of the crime than to "prove," as the Solar scribe has it, what country was entitled to claim the "honour" of having given birth to the criminals. But it seems our brethern and ourselves also "hastened to prove that the idea of cutting people's throats for the sake of selling their bodies to anatomists, is far *too original* for the *inferior conceptions* of Scotchmen." We know of nothing, however, which we should not consider "too original for the inferior conceptions" of *one* Scotsman, whom we need not name, and whose talent for misrepresentation seems to be nearly on a level with the shallow petulance and presumption under the cloak of which he tries to hide his ignorance. This, however, is not the best of it.

"Further than his name (continues the Solar gentleman) there is nothing to prove that Burke is an Irishman."

Indeed! Why, man, Burke himself has confessed it in his declaration, read at his trial; and if the murderer had been silent on the point, his brogue would as certainly and inevitably have betrayed his country, as your Invernessian nasal drawl, with a little touch of the genuine Celtic accent engrafted thereupon, would have betrayed your northern origin and your Celtic descent. Burke *is* an Irishman, and so is Hare, and so is Hare's wife; and so is the woman M'Dougal, Burke's concubine, though her name would indicate that some of her ancestors might have been Highland cousins to some of your own—a relationship which your "amiable bashfulness" will not, we trust, "prevent you from publicly claiming."

He proceeds—"With respect to the inferior conceptions of the Modern Athenians, what, let us ask, can equal the ingenuity of *Lord* Lauderdale's famous torture boot?" Nothing, certainly, except it be the "ingenuity" of such a driveller as this, who fancied that there is any thing at all *ingenious* in putting a human leg in an iron hoop or ring, and driving in a wedge between them. A more brutal decree, or one betraying less of "ingenuity" was never fallen upon to inflict torture on a fellow creature. It might even have been invented by the blockhead who here calumniates his country; it is not below even *his* "inferior conceptions;" we consider the device on a level with *his* capacity: and, we believe, it was generally from among his countrymen that persons were sought for, and found to enact the part of exe-

cutioners in putting the heroic martyrs of the Covenant to this species of torture. The following is his concluding touch:—

"The West Port murder, judging from internal evidence, *is decidedly of Scotch origin.* There is a cool, methodical, business-like air about it, a scientific tact in the conception, and a practised ease in the execution, *which no* IRISHMAN *could ever yet attain!* An Irish murder is hasty, sudden, and impetuous—an English one, phlegmatic, cunning, mercenary—but it has been reserved for the Scotch, in this last unequalled atrocity, to blend the qualities of both English and Irish guilt, *with a scientific effrontery peculiarly and pre-eminently their own.*"

With an "effrontery" which is very far indeed from being "scientific," but which is nevertheless "peculiarly and eminently his own," it has been reserved for this blundering renegade to pronounce a series of murders, devised and perpetrated by Irishmen alone, as "decidedly of Scotch origin;" to talk of the "internal evidence" of a murder, while he is in ignorance of every thing concerning it, except the mere fact of its having been committed; to pander to the prejudices of the very lowest class of Englishmen by pouring out abuse upon Scotland; and to compromise the solid interests of his constituents, the highly respectable proprietors of the *Sun*, by venting libellous scurrilities against the country which had the misfortune to give him birth, and where that journal has hitherto been received with a degree of favour to which, not the talents of its editor certainly, but the activity of its reporters seemed to entitle it. But let that person look to himself. We know it is always renegade Scotsmen who are loudest and fiercest in abusing their country. Dr. John Macculloch is one of that class, and he has accordingly been served out in some measure proportioned to his deserts. If the editor of the *Sun*, therefore, has a mind to indulge farther in such disgraceful scurrilities, he had as well accustom himself *paullatim et gradatim* to stand a pretty vigorous application of the scourge.

4. In the report of the Lord Justice-Clerk's charge to the Jury, in Burke's case, his Lordship is represented as having stated something to the following effect: "They (the Jury) had been told of the Hares being concerned in other murders. With what murders they might be chargeable, he did not know; but to a certainty, they could not be libelled on either of the charges contained in the libel now under trial, and which had not been sent to the Jury." There must have been some mistake here. Indeed, the passage is inconsistent with itself; for there could be no libel "under trial," which had, nevertheless, not been sent to the Jury. As his Lordship, however, has been understood to have said that the protection of the Court extended to all the three charges of murder contained in the indictment against Burke and M'Dougal, and that the Hares could not be challenged for the murders of Paterson and Daft Jamie, any more than for the murder of Docherty, upon which alone Burke was tried, we shall take the liberty to throw together a few observations on this point, which is one of great interest and importance at the present moment.

Every one can easily imagine the objections that lie to the admissi-

bility of an accomplice as a witness against those with whom he has been concerned in the commission of a crime. With the Judges of former times, according to Sir George Mackenzie, these considerations had been of sufficient weight to determine them against receiving a *socius criminis*, except in the trial of such crimes as must have otherwise passed unpunished. If this rule ever obtained, however, it was soon infringed upon; and in process of time, the *socius* came to be admitted wherever there was a *penuria testium*. But it was only at a comparatively recent period that the nature of the protection afforded him was clearly defined. Before that time, he was in a great measure, if not altogether, at the mercy of the prosecutor; and consequently his evidence was liable to be influenced by what he knew was expected of him, and by his dependence on the prosecutor alone for an immunity from trial. The risk of this bias, however, is obviated; if it shall be held, which is now the established opinion, and was delivered for law from the Bench in the noted case of Smith and Brodie, "that by the very act of calling a *socius* as a witness, the prosecutor discharges all title to molest him for the future, *with relation to the matter libelled*."—Hume II. 354.

But to understand this authority properly, we must recur to the principle upon which the decision in question was founded. No witness is bound to answer a question tending to criminate himself, and whenever such a question is put, the Court will tell him so. But a *socius* cannot answer a question which might not have this tendency, were he unprotected; and hence, from the necessity of the case, protection is afforded him. This protection, however, can only apply to the evidence he actually gives, and the self-criminatory disclosures therein contained. Till he gives evidence there is no protection, and that protection is measured by the nature of his evidence. But he neither has nor can have any immunity or protection from trial for crimes in regard to which he was not called to speak at all.

Now, this is exactly the situation in which the Hares now stand. The Public Prosecutor has discharged all title to molest them in regard to the murder of Docherty, the only part of the libel against Burke which went to trial, because they gave evidence and criminated themselves in regard to that crime; but he has not discharged this title to pursue them for the murder of Paterson or Daft Jamie; and, accordingly, when Mr. Cockburn proposed to interrogate Hare in his cross-examination, concerning his connexion with the latter crime, the Court interposed, by telling the witness that he was entitled to decline answering such a question as tending to criminate himself, and as beyond the reach of the protection afforded him for his evidence in the case of Docherty. It was expressly stated from the Bench, that his answering the question put by Mr. Cockburn would implicate himself in the crime. And how else could he have been entitled to decline answering it? As a protected *socius*, he was bound to answer every question that should be asked him within the compass of that protection; and if it had extended to and included the murder of Jamie, which was included in the same charge, the obligation to answer would of course have been co-extensive with the protection. "The matter libelled" spoken of by Mr. Hume, therefore, can only

mean the "matter libelled" and sent to trial, and in regard to which the *socius* gives evidence.

But by the judgment of the Court on the objection taken to Burke's indictment, they virtually found that it was three indictments in one; for they ordered each of the charges to be tried in succession, giving to the prosecutor merely the option as to which of them he should begin with. The procedure ordered to take place was the same as if there had been three separate indictments. One of the charges was tried, and a conviction obtained; and there the proceedings stopped. Now, suppose there had been three indictments, and that he had been tried and convicted on one of them; where is the difference, we would ask, in point of principle, between the case supposed and what actually occurred? None whatever that we can discover. But had there been three separate indictments, it would never have been pretended that a *socius* giving evidence under the only one of the three brought under review, could be protected from all challenge as to the crimes contained in the others; and no more can it, with any shew of reason, be maintained, that Hare, who gave evidence in reference to the only one of the three charges which was tried, is secure from prosecution in regard to either or both of the other two, which were not tried. If the whole three charges had been tried at once, and Hare had been called upon to give evidence in reference to all of them; or if they had been tried successively, and Hare had been thrice produced as a King's evidence; then he would have been protected, and the prosecutor would have been discharged from all title to molest him with relation to the "matters libelled;" but, as it is, we repeat that he is only protected from challenge in regard to the murder of Docherty, and that he is as liable to trial for the murder of Paterson or Daft Jamie as he is for any other murder, or as he would have been had he never appeared in the box as a King's evidence at all.*

The hand of justice, in the trial of Burke and M'Dougal, has withdrawn the veil which concealed from public gaze scenes of blood and horror, which outdo in reality all the creations of the most gloomy and romantic imagination; which makes man blush for himself and his fellows, and will be referred to with shuddering interest by yet unborn generations. We see, at least, four wretches, "filled from the crown to the toe, topful of direst cruelty," divested of all the sensibilities of our nature, and reckoning the lives of human beings as of no higher value than those of the beasts of the field; take up the trade, and systematically pursue it, of butchers of their own kind. We see them luring their victims by a treacherous affectation of kindness to their dwellings, turned by them into slaughter-houses, and there coolly murdering them, for the sake of the profit to be derived from the sale of their bodies. Their slow and deliberate mode of murdering we cannot dwell upon, from a feeling of unutterable loathing. Compared with it, the bowl and the dagger lose half their horrors; because *it* pre-eminently supposes the most flinty and remorseless heart, and unflinching temper, neither of which is to be subdued or softened by those awful signals of agony which nature throws out when

* Taken from the "Caledonian Mercury."

struggling with a violent death, and which the most practised murderer recoils from, as too appalling to his conscience. Were it possible to distinguish between the four wretches, under whose feet the earth may be supposed to groan, we would say that the guilt of the women is the deepest and most revolting; because woman's nature is more remote than that of man from deeds of blood. To each of these women we may truly apply what was said of a female fiend of antiquity, *Nihil muliebre præter corpus gerens;* and, worse than the Brownrigs and others who have disgraced their sex, their names will descend to posterity, accompanied with unmingled execrations. Ever shall we regret that M'Dougal was not made to pay the penalty of her crime upon the gibbet. We cannot understand upon what principle she was acquitted; for her accession to the murder of the Irish woman, both before and after the fact, was proved and demonstrated beyond a doubt. It would be most dangerous to establish the principle that none but the direct *actor* in a secret murder should be held guilty of it. Justice, doubtless, demands that for the deaths of the many who have perished by these four monsters and their accomplices, more victims shall be immolated upon her altar. The public voice also calls for other sacrifices. The little that has been disclosed of the much guilt there is, is more than enough "to create a soul of *vengeance* under the ribs of death;" and it is vain to suppose that the angry, but most virtuous and holy, cry now raised by a whole people is to be appeased by the scanty offering which it has been decided is to be made to justice. No false delicacy—no dread of popular excitement ought to restrain the ministers of justice from exacting the blood of those by whom blood has been, and may yet be, so profusely shed; for, in proportion to the disgusting, revolting, and heart-sickening nature of their crimes, is there a necessity of purging the land of the monsters. Hare (whose appearance is an epitome of all that is mean, subtle, and ferocious), and his wife (whose aspect is much upon a par with his own), cannot, for technical reasons, be put upon trial for the murder of the Irishwoman; but there is no bar to their being tried for other murders; and sorry are we to say that there are other individuals, with respect to whom there is what lawyers call a *probabilis causa* for committing them. It is lamentable to think that the practice of a science, designed for the preservation of human life, should, through the avidity of any individual to possess *subjects*, have directly tended to encourage its profuse destruction; that the science should have stooped to a junction with the basest and most unhallowed ruffianism, and derived aid from acts which terribly violate the laws of both God and man. In purchasing the bodies which had come under the fell gripe of the Burkes and the Hares, there must have been an utter recklessness—a thorough indifference as to causes and consequences, which, in point of criminality, very closely borders upon *guilty knowledge*. These transactions have cast a stain upon the profession, which, for years to come, the fair fame of those who pursue it—(a fame resting not more upon their eminent skill than upon their acknowledged benevolence)—will not can obliterate. It is singular, that the only symptom we have yet discovered of the "march of intellect" among the lower orders, is certain recent discoveries in the art or science of crime. The most important of

these is the poisoning of people, for the sake of the money to be found upon them, and the strangling of them for the sake of the money to be obtained from the sale of their carcases; with both of which our simple ancestors were perfectly unacquainted. That either, but the last especially, though of such prodigious wickedness, should be a *novelty* at the present day, greatly astonishes us.

We fully agree with the Morning Chronicle, that there are many men who would, and do commit murder for more trifling gains than are to be derived from the sale of a corpse. Not a great many years ago, an Irishman murdered a pedlar-boy in Eskdale Muir, he being covetous of the paltry gewgaws which the poor creature had in his box. About two or three years ago, an old Highlandman was savagely slaughtered in the uplands of Aberdeenshire; the incentive to the crime being a desire, on the part of the murderer, to possess himself of a crown-piece. And much about the same time, a private soldier, travelling on furlough, was shot to death in the neighbourhood of Glasgow, by three ruffians, who were strangers to him, with a view to the contemptible booty they might find upon his person. Can it be doubted, then, that there are many miscreants, who, when they become possessed of Burke and Hare's fearful secret, will not hesitate a moment, if there is a prospect of impunity, to murder a fellow-creature, in order to convert or coin his body into ten sovereigns? Much do we fear, now that the secret is out, that the above two wretches will have many imitators in their career of guilt, notwithstanding the example which is about to be made of one of them. We fear this the more, because the facility and secrecy with which murder may be committed in pretended lodging-houses, upon vagrant strangers and prostitutes, whose disappearance would occasion no remark, cannot escape the notice of those who are deeply engaged in the practice of crime. These are painful, but necessary considerations, which we cannot refrain from urging, and which we trust, will be pressed upon the attention of the Legislature. We cannot conclude without noticing the absurdity which has been committed, by some provincial journalists, in upbraiding the population of this city with crimes committed within its purlieus, by four vagabonds, who are not natives of it. Equal to this absurdity, would be the injustice of stigmatizing, on account of these crimes, the whole people of Ireland. God knows, that, in every nation, most foul and unnatural murders have been perpetrated; and while it is remembered that Burke and Hare and his wife are from Ireland, let it not be forgotten that M'Dougal (we blush to say it) is our own countrywoman, and that the witnesses Gray and his wife, through whose honesty and decision the hidden iniquities of the gang were first brought to light, happen to be Irish.*

When Burke was removed from the court-room to the lock-up-house, he was considerably agitated, and, throwing himself upon his knees, addressed a prayer to God, whom he had so grievously offended. During the rest of the day he was composed, and even spoke cheerfully to the policeman who had the charge of him. He expressed his

* This is a mistake: Gray states himself to be a native of Edinburgh, born in the Grassmarket; his wife is also a native of Scotland.—*Vide* the account of both in this *Appendix*.

joy at the acquittal of M'Dougal, who is not his wife, but cohabited with him as such. He also said that the Irish woman was murdered, not by him, but by Hare, in the manner described in Hare's testimony; but admitted that, during the shocking operation, he held her hands. The policeman observed, that he wondered above all things how he could imbrue his hands in the blood of Daft Jamie—a being, by the bye, whose fate, from his inoffensive and amusing habits, has excited more commiseration than that of all the other butchered individuals. To the policeman's observation, he replied, that, as he hoped to meet with mercy at the Throne of Grace, his hand was not concerned in that murder. Hare and his wife, he said, were the sole perpetrators of it; but he allowed that he had decoyed Jamie to their house. He confessed *that he had participated in many more murders than those he had been indicted for;* and said, that after his mind was composed, he would make disclosures, which would implicate several others besides Hare and his wife, in the same crimes as those for which he was doomed to die. If, he said, he could make sure of the hanging of Hare, he himself would die happy. He was asked, how did he feel when pursuing his horrible avocation? He replied, that in his waking moments he had no feeling; but that when he slept he had frightful dreams, which previously he had been unaccustomed to. The fact is, that the wretch, when awake, by means of ardent spirits, steeped his senses in forgetfulness; and his excessive use of spirits accounts for his absolute penury at the time of his being apprehended. He expressed a wish that one of his counsel, whom he mentioned, would call upon him, that he might furnish him with notes of his life and adventures, as he was desirous to have his history published. At night he had short fits of sleep, during which he raved, but his expressions were inarticulate; and he grinded his teeth in the most fearful manner. Whenever he awoke, he was in a frantic state, but always recovered his composure; and in the course of the evening, he read two chapters of the bible. At two o'clock on Friday morning, he was removed in a coach to the Caltonhill jail, and put upon the gad. As before his trial Burke had intimated his intention to destroy himself, he has, since his conviction, been constantly watched by a person stationed within his cell.

The house occupied by Burke and M'Dougal was, since the trial, visited by shoals of people until Friday night, when the person in possession of the key, to escape the very unjust imputation which had been cast upon him by some, of his having made money by shewing the place, returned it to the landlord. The immediate access to it is appropriate—namely, through a dark passage, where the women stood while the murder of the Irish woman was being perpetrated. The dwelling is one small room, an oblong square, which presents the exact appearance it had when the culprits were apprehended. There is still the straw at the foot of the bed, in which the murdered woman was concealed. Altogether, it has an air of the most squalid poverty and want of arrangement. On the floor is a quantity of wretched old shoes, of all sizes, meant by Burke, perhaps, to indicate his being a cobbler; but they are so wretchedly worn, that we cannot suppose they were left with him to be mended, or that he designed to improve their appearance, for the purpose of selling them. We incline to think that they belonged to some of his victims. The dwelling is

most conveniently situate for the murderous trade he pursued,—there being many obscure approaches to it from different directions. Hare's dwelling, also, has attracted many visitors. Its appearance is equally deplorable with that of Burke. It is on the ground floor, consists of two apartments, and overlooks a gloomy close. Beside it is a sort of stable, used by Hare as a pig-stye, and secured with a large padlock. In this it is believed Hare and Burke committed many of their butcheries; and here, we are inclined to think, Daft Jamie encountered his fate. We cannot believe that, as Hare has stated, the poor idiot was put to death before mid-day in that monster's house; for, in that case, his cries, which are said to have been very loud, must have alarmed the people in the flats above. It is true, that the two assassins had been in the habit of getting up sham-fights in their houses, that the vicinage might be induced to take no notice of noises within them; but still the fearful yells and shouts of a stout young man, struggling for his life, at that time of the day, and in Hare's house, every part of which is seen into from the close, must have attracted the observation of neighbours.

We will notice the two murders charged in the indictment, but not entered upon by the Lord Advocate, as, we understand, they have been described by Hare. That villain, we may observe, always makes his associate the principal actor; but Burke's description totally differs from his; and, situate as Burke now is, entertaining not the most distant hope of mercy, we think that what he says is most entitled to credit. The first murder charged was that of Paterson, a girl possessed, it is said, of great personal charms, but of loose habits. She and a Janet Brown having been liberated about six o'clock on the morning of 9th April from the Canongate watch-house, in which they had been confined all night, were on their way to a public-house, when they met Burke, who, by promising them breakfast, and giving them two bottles of whisky, induced them to go with him to the house of his brother, Constantine, a scavenger in the Canongate. Burke and the woman M'Dougal got up a fight, pending which Hare, who had been sent for, made his appearance. The girl Brown, who rightly construed Hare's brutal countenance as a *caveat* against sitting in his company, took the alarm, and went away, leaving Paterson asleep in a bed. She returned in about twenty minutes, anxious for her companion, and was told she had left the house. In the afternoon she again inquired after Paterson, and received the same answer. During Brown's short absence in the morning, Burke had stifled the wretched girl; and between five and six o'clock in the afternoon, her body was in the dissecting-room, where £8 were paid for it.

As to the case of Daft Jamie—(be it remembered we still speak upon the foul authority of Hare)—it was still more atrocious. Doubtless, the assassins had long "marked him for their own." One morning in the beginning of October, he was met in the Grassmarket by Burke, who, learning from him that he was in search of his mother, to whom he was ardently attached, persuaded him, that he, Burke, knew where she was; and, by this pretence, decoyed him to Hare's house, where, after much resistance on his part, he was prevailed upon to swallow spirits to such a degree, that he sunk down upon the floor in a profound sleep. Burke was anxious to commence the work of

murder; but Hare observed that as yet he, Jamie, was too strong, and it would be better to delay it. Burke, in his impatience, after a short delay, threw himself upon Jamie, and proceeded to strangle him. The unhappy creature, roused to a sense of his danger, threw Burke away from him, and sprung to his feet. It is in moments like these that the instinctive movements of the idiot assimilate to the actions of the rational man. Jamie, who fought like a hero, would actually have subdued Burke, but that Hare, whose assistance was loudly demanded by his associate, tripped up Jamie's heels, and, as he fell, Burke again threw himself upon him. While Hare was dragging Jamie along the floor, Burke being still above him, Jamie contrived to bite the monster of an *incubus* who oppressed him, in such a way as to occasion a cancer,* which, it is thought, without the hangman's aid, would soon precipitate him into eternity. This circumstance goes far to support the often-alleged fact that the *saliva* of an enraged man, absorbed into the system of another, has a poisonous effect analogous to that of hydrophobia produced by the bite of a rabid dog; and so convinced are some of the African tribes of the truth of the fact, that when any of them engages in a conflict with another, with the intention of using his teeth, he previously throws himself into a violent rage. However, poor Jamie was eventually overcome before mid-day; and a student, who had seen him two days previously in good health, saw him stretched out at length on the dissecting-table.

It is impossible to calculate to what extent these villians have carried their murderous practices. Our conviction is—and we know that our estimate falls much short of the generally adopted one—they must, in certain seasons, have murdered at least two individuals in the course of each week; to do which, they had sufficient opportunities. Their habits of life, sordid as their dwellings are, imply as much. We mentioned, at the first *blush* of this horrible business, that a washerwoman, in the Grassmarket or West Port (we forget which), and the girl Paterson, had disappeared under very suspicious circumstances. That Paterson was sacrificed to the avidity of Burke and Hare is beyond all doubt; and that the washerwoman met the same fate, we have the strongest reason to believe. We have as little reason to doubt the following imputed murders, from a circumstance which will appear in the sequel:—About a fortnight previous to the apprehension of the murderers, an Irish beggarwoman, with her idiot son, who had reached puberty, arrived at the house of Burke, when the mother was suffocated by him on the straw at the foot of the bed, and her body put into brine in a herring-barrel; while Hare killed the lad by breaking his spine when across his knees, and threw him into the barrel above his mother. Burke's conscience, seared as it is, has been more agonized by his recollection of the death of this boy, than of that of any other atrocity in which he participated. Since his sentence, Burke has confessed that he shared in the murder, in Hare's house, of a young married female of the name of Jane M'Dougal, a niece of the proper husband of the woman M'Dougal.

* This is incorrect: Burke had been for many years complaining of a schirrous testicle, which would ultimately have caused his death. He received no injury on this occasion.

Her sister, who is in the greatest distress, has been inquiring at the wretch M'Dougal regarding her fate; but the only intelligence she could extract from her is, that she was murdered by Burke.

M'Dougal was liberated on Friday night, having been detained in the Lock-up-house solely for her personal protection; and immediately returned to occupy her old den, the scene of so many murders. On Saturday evening, however, she incautiously ventured out to a shop in the neighbourhood for whisky. The liquor was refused her; but she was observed by some boys, who called out that it was M'Dougal, and a mob almost immediately assembled. The police appeared on the first alarm, and taking her in charge proceeded to convey her to the watch-house in Wester Portsburgh; but such was the fury and exasperation of the mob, determined, apparently, to tear the wretch to pieces if they got hold of her, that the policemen were compelled to use their batons without mercy, in order to cover her retreat to the watch-house, which they reached with the greatest difficulty. Arrived there, the mob increasing every moment in numbers and fury, they endeavoured to afford the unhappy creature protection; but the windows being smashed in, and a disposition manifested by the multitude to storm the watch-house, the people within, were as a dernier resort, obliged to dress her in men's clothes and put her out by a back window. When this was effected, the fact that she had left the office was announced to the mob, who having missed their intended prey, soon after dispersed.

In the course of Sunday the 28th December, great crowds of well-dressed people resorted to the West Port to visit the scenes of the late murders; but so far as we have been able to learn, no disturbance of any kind took place. The only object on which popular fury could vent itself, had, by the exertions of the police escaped: and the only feeling that predominated, was one of curiosity mixed with horror.

On Tuesday (December 30th) M'Dougal, who is still lurking about town, applied at the jail to have an interview with Burke, but was refused. Her attachment to him, perhaps from congeniality of disposition, is undoubtedly strong. Burke, since he went to jail, has been remarkably composed and devout. He has observed that he is by no means a bigot in religion; that besides Popish churches, he had, when a soldier, attended Presbyterian, Episcopalian, and Methodist ones, with the peculiar tenets of all which he appears to be perfectly conversant. He says that he has received instruction from good men of every faith; and that "real repentance and a strong belief" are sufficient to ensure salvation. The other day, the Rev. Mr. Marshall of the Tolbooth church, and the Rev. Mr. Stuart, Catholic priest, called at the jail to see him; and, on being asked which he would wish to converse with, he replied that he would have both. Yesterday he received a visit from the Rev. Mr. Reid, Catholic priest. He persists in saying that Hare originally reduced him into the commission of murder.*

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* Taken from "The Edinburgh Weekly Chronicle" and the "Caledonian Mercury."

(From the "Edinburgh Weekly Chronicle.")

We are compelled to resume this awful subject, and request that our readers who have already "supped full of horrors" will bear with patience at least the facts we may yet have to state, and the remarks we shall offer.

The public feeling upon the subject has, ever since the trial terminated, daily increased in intensity; and the whole kingdom, from Cornwall to Caithness, rings with cries of indignation at the unparalleled foulness of the crimes which have been brought to light, the acquittal of the fiend M'Dougal, and the worse than brutal indifference of those persons to whom the murderers disposed of their merchandise. Indeed, it could never have been supposed that such things were to

"——— Overcome us like a summer's cloud,
Without our special wonder."

Incredulity, at an early stage of the business, held the public indignation in check; but the worst that was feared has been fully realized; the most sceptical are now fully convinced, while reflection discovers, in the crimes committed, features too shocking and hideous ever to have been imagined. Reflection, then, which, in the general case, has a pacifying influence, in this serves to fan the flame of public resentment, which will never be quenched but in the blood of more than one of the assassins, or of their accomplices. To prove the growth of this most righteous feeling, we may mention the fact of the houses of Burke and Hare (the former of which has been re-opened) being *now* far more numerously resorted to by persons of all classes, than they were immediately after the termination of the trial.

There have been some very painful suspicions of late that the investigation of those murders is not to be farther prosecuted; and from the circumstance of M'Dougal, and Constantine Burke and his wife, having left this city for the West Country on Wednesday morning last, we are inclined to believe that such at one time was the Lord Advocate's determination. We happen to know that a certain public functionary (not the Lord Advocate, whose zeal in forwarding the late trial is beyond all praise), remarked the other day that *they* were perfectly sick of the business, and were resolved to stir no farther in it, lest it should bring shame upon the city! So this worthy personage opposes his delicate feelings to the canon of the Almighty, which says, "Whoso sheddeth man's blood, by man shall his blood be shed;" and from a respect to the reputation of this city, would extend impunity to the cold-blooded murderers of its inhabitants!!! If this gentleman's sensibility is such as to dispose him to throw a shield over crimes of the deepest die, all we shall say is, that he is totally unfit for his situation. If, by limiting the infliction of punishment to one of the murderers, others shall be encouraged to repeat crimes of the same kind, then according to the views entertained by this gentleman, still greater disgrace will attach to the city; and then, according to his precious logic, so much greater will be the propriety of taking no notice of them. In the present excited state of the public mind, no Lord Advocate will dare to say, "Thus far—(to the death of Burke)—shall the tide of public vengeance flow, and no

farther." The present Lord Advocate has too much good feeling—a too high regard for the public opinion—to admit of our supposing that he has come to any such determination. We would be the last to propose that his Lordship should violate any engagement, tacit or express, he may have entered into with Hare and his wife. If such an engagement has been entered into, it may possibly include, which we would deeply lament, a remission to them of all the murders they have been engaged in. But surely, now that the evidence as to those transactions has been augmented by the acquittal of M'Dougal, there can be little difficulty in discharging the bolts of justice at the heads of other offenders. On the occasion of the trial, had the Lord Advocate been resolved to adopt no ulterior proceedings, he certainly would have adduced his evidence with regard to the whole three charges, in order to satisfy the public that the guilt of all the persons implicated had been sifted to the bran by the Crown Officers; and, particularly, he would have examined Dr. Knox, were it only to "sear his eyeballs," with the sight of a multitude of his fellow-citizens listening with horror and indignation to the details of his testimony.

It is satisfactory to reflect, however, that our law has wisely restricted the Lord Advocate's prerogative, so that, even were he disposed, he cannot screen a murderer from justice, if the deceased's relations incline to prosecute him. The law says that murder shall not go unavenged, if either the public, represented by the Lord Advocate, or those who have been deprived by it of a near relative, insist for punishment. Will not then the friends of some of the butchered individuals, whose blood calls to Heaven for retribution, be roused to prosecute the butchers? No one can doubt that money would be liberally provided by the inhabitants to defray all expenses. A public meeting should be held upon this very subject.

With regard to Dr. Knox, too much delicacy and reserve have been maintained by a part of the press. When the atrocities in question first transpired, it was stated that Knox conducted himself with the utmost civility towards the police-officers who went to his house in search of the body, when the fact is, he swore at them from his window, and threatened to blow their brains out; and it was only upon their proceeding to force the door of his lecture-room, that it was opened by one of the keepers. Farther, a number of citizens have been called "fellows" by the press, because, acting upon a virtuous feeling, they ventured, illegally we grant, to indulge it, by breaking the windows of that man by whose myrmidons the temple of human life had been so often broken into and despoiled. Great pains, too, have been taken to persuade the public that the doctor was imposed upon by Burke and Hare with regard to the mode in which they acquired their *subjects;* but mark how a few queries will put down that supposition!

Were not bodies—one of them of a girl, with her hair *en papillote*—both warm and souple, repeatedly received into his lecture-room?

Did not Burke and Hare exclusively deal with Dr. Knox; and must not all their *subjects* have exhibited nearly the same symptoms—which symptoms, in the case of the woman Docherty, at once satisfied other medical men that she had been violently bereaved of life? And why did not the constant recurrence of these symptoms, as well as the symptoms themselves, rouse Dr. Knox's suspicions?

Has not the Doctor acknowledged that he has repeatedly bought bodies which had never been interred, alleging (and we believe partly with truth) that they had been disposed of by relations? And did not his doing so encourage among the lower orders, a most barbarous, unnatural, and demoralizing practice?

There are certain atrocious particulars connected with the murder of the woman Docherty, which are very susceptible of proof. A person in Dr. Knox's employment actually offered her for sale to a respectable gentleman of the profession before she was despatched; he saw her in Burke's house immediately after the spark of life had been extinguished; and he then again offered her for £15 to the same gentleman, who indignantly ordered him out of his house.

If neither Dr. Knox nor his man can be considered as any way accessary to any of the murders (and we hope it may be so), there cannot be the least doubt that both may be indicted for the misdemeanour of purchasing bodies under the circumstances we have described; by which process the public may be relieved of those terrors which their presence in this city so naturally inspires. While the question as to the policy of winking at occasional exhumations remains unsettled, we have no desire to have the law strictly enforced against those who purchase subjects which have been come at in the ordinary manner; but all the circumstances of this case are fraught with a peculiar criminality, which requires most exemplary punishment. We trust that, in such a case, we shall not see falsified the proud adage of our law, that the life of the poor man is as precious in its sight as that of the wealthiest; or verified Lear's bitter observation, that

> "———— Plate sin with gold,
> And the strong lance of justice hurtless breaks:
> Arm it in rags, a pigmy's straw doth pierce it."

It was not so, in 1814, when Dr. Patison of Glasgow—a person fully as eminent in his way as Dr. Knox, was arraigned at the bar of the High Court of Justiciary, along with a lecturer on surgery, and two medical students, for having disinterred a human body. *Has the spirit or the practice of the law changed since that period.* What distinction can be made between the case in which Dr. Patison was involved (innocently we are bound to believe) and the present one of Dr. Knox, which is not stupendously and infinitely to the disadvantage of the latter? *The greatest curse that can befal a country is the administrators of its law showing that law to be capricious in its practice.*

We have heard most unmeasured praises bestowed upon the learned gentlemen who defended Burke and M'Dougal, because they rendered their services *gratuitously.** We cannot, admitting the *postulatum*, concur in those praises. Had the highly talented counsel supposed the murderers to be innocent, they might very safely have left them to the proverbial caution and lenity of a Scottish jury.†

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* We have it from undoubted authority, that the services of the counsel were gratuitous. The Dean of Faculty was induced to undertake the defence of Burke, solely at the solicitation of the junior counsel, who waited on him in a body for that purpose.

† Two of the jury, we learn, on the Trial of Burke and M'Dougal, were for acquitting Burke; and it was only by a sort of compromise that a unanimous verdict was returned against that person!

If they supposed them guilty, why expend their talents in trying to rescue them from their merited fate? We believe better of these gentlemen than to suppose that they rendered their services *gratuitously*. Had they been *fee'd*—(and our impression, which may be wrong, is that they were so, but by whom we cannot say)—the only observation we could have made is, that they acted in a *business-like* manner. Of all humbugs, professional humbug is the most dangerous, because it is the most imposing.

(From the "Caledonian Mercury.")

Every hour some fresh tale of horror reaches us. Since our last we have been told of many things—(aye, and told, too, by anatomists)—calculated to freeze the very blood in our veins. Murder upon system—murder almost by wholesale—has been carried on in this city for the last year and a half; and not only has it been systematically committed, to an extent which it is appalling to contemplate, but it has been perpetrated upon the most refined principles of anatomical science, and with a knowledge of the functions and organs of life, which few ordinary medical practitioners possess, and which must have emanated from some higher source, yet unsuspected or unknown. In fact, this is the most fearful, as it is the most melancholy and deplorable attribute of the crime; and it is one circumstance among many which calls loudly, and trumpet-tongued, for further investigation. The horrid circumstances which have been stated to us in regard to victims, the disappearance and murder of whom have not yet been brought to the knowledge of the public, we, *for the present*, refrain from mentioning, in the hope that the Lord Advocate will redeem the solemn pledge which he gave to the Court and the country in the course of the late trial; but matters have now come to such a pass, and a system of such infernal iniquity has been revealed to us, by those whose dearest interests are concerned in having the truth, the whole truth, and nothing but the truth, unravelled, that, unless some steps are speedily taken to bring to justice *all* those who have been concerned in it, we shall feel ourselves called upon to throw aside every feeling and every wish to spare by which we are now restrained, and to disclose facts which we have reason to believe are already known to the legal authorities, but which, openly proclaimed to the world, they can no longer hesitate or refuse to investigate. It won't do to affect a contempt for statements contained in the newspapers, or to tell men whose professional character and reputation are at stake—"We do not even deign to laugh at them." There is nothing particularly calculated to move the laughter of any one, however largely he may share in the *præfervidum ingenium Scotorum*, in the recital of multiplied atrocities, such as never before disgraced the annals of any civilized country; nor is it long since a statement in a newspaper—in our own—relative to the circumstances in which the body of the infant stolen from the Pleasance was found, led to an investigation which, we understand, is still in progress, and which may ultimately bring about the discovery of the murderer. The sacrifice of Burke alone will not appease the present righteous cry for vengeance against a horde of systematic and scientific murderers; nor will the public tolerate an

attempt to "smother" an inquiry, because it might eventually implicate persons of a different description. *Fiat justitia ruat cœlum.* The community can have no interest so strong as they have in the equal and uncompromising execution of the laws; and they can suffer no injury so great as that which must be inflicted upon them by attempting to arrest the course of justice, where crimes have been committed which strike at the very roots of society, and are calculated to unloose the bonds by which it is knit together.

"We have heard, with unspeakable surprise," says an able writer in the *New Scots Magazine*, "that these judicial investigations are to proceed no further, and that the miserable wretch Burke is to be the only victim that is to be yielded up to public justice. We cannot believe this rumour; for assuredly the public mind cannot be quieted by such an imperfect inquiry as this trial has afforded. THE LORD ADVOCATE PLEDGED HIMSELF TO PROBE THESE ASSASSINATIONS TO THE BOTTOM—*and to pursue those measures which are necessary to tranquillize the public agitation*—a feeling which we are sure at this moment pervades every family, and every mind in this city—and wherever the tragical tidings have been heard. To stop short now, will just be to leave in every breast that undefined and gloomy apprehension which haunts the imagination, and oppresses it more heavily than a full knowledge of the real extent of such evils in society; and we have such confidence in the sound discretion of the Lord Advocate, that we cannot imagine he will leave the nest of monsters, who have taken up their abode and practised the trade of murder among us, unkennelled, and without bringing every individual implicated to a public trial, and disclosing to the community the dangers they have to guard themselves against from such a system of terror, and such a horde of miscreants. We have only one *practical* remark to make, and it is, that the higher authorities should pay some attention to our police establishment, and prompt them to a vigilant discharge of their duty. It does not appear that the officers of police had the slightest intelligence of any one of the murders which are now known to have been committed; and but for the information given by the man Gray, whose wife discovered the murder of Campbell, the whole mystery of iniquity might have still remained in full operation. *The police had no merit whatever in this affair; and indeed its officers act upon a principle which actually affords facilities for the repetition of similar crimes.* They have instructions not to interfere in such scenes as preceded, or rather formed a prelude to the murder of Campbell, and will not commit the perpetrator of an outrage tending to murder, unless they either see it, or some informant commits an offender to custody. There could not be a better illustration of the utter absurdity of this regulation, than the facts which have come out on this trial. If Alston, who heard the broil in Burke's house, when the murder was committed, could have found a policeman in Portsburgh, and if they had entered the house at the moment that cries of murder issued from it, the perpetration of it would either have been prevented, or the whole gang of murderers would have been apprehended in the fact. Unless, therefore, a different principle is acted upon, the police is useless, and worse than useless; and, however meritorious it may be in detecting petty larcenies, it is utterly inefficient for the protection of life in this city."

In every one of these observations we entirely concur. More effectual protection to life is indispensably necessary; but the first and most important step towards affording it is to bring to justice all those who have been trading in murder. And to show the indispensable necessity for this, we beg our readers to attend to the *mode* in which it was proved at Burke's trial that the late murders had been committed. To render our statement intelligible, however, it will be necessary to give some preliminary explanations.

At every inspiration, the ribs of the chest or thorax are dilated by muscular action to an extent of about one-fifth larger than immediately after expiration, and, in cases of a full or strong inspiration, to nearly one-third. A partial vacuum is thus produced, and the atmospheric air rushes in by the trachea to fill the cavity in the diaphragm, the recipient of the air inspired, and to oxygenate the blood. In murder upon scientific principles, therefore, the first point is to compress the ribs of the thorax, so as to prevent this dilatation; and if the compression be powerful, it will of itself be sufficient to destroy life in a few minutes, without the application of pressure to the throat at all, and without leaving on the body any external marks of violence. Even a full grown bull might be destroyed in this way in a very short space of time; for independently of the necessity of respiration to the support of life, the blood, for want of oxygen, instantly becomes poisoned, and this of itself would occasion immediate death. If, however, to this compression of the ribs of the chest be added what Dr. Christison called "throttling," or the simultaneous application of pressure to the trachea, nay, if the head were even thrown back so as to strain the windpipe out of its natural position, without any application to the throat at all, the consequence of the use of both means would be the immediate extinction of life. But mere "throttling," without compression of the chest, though it might produce death if carried the length of literal strangulation, would always leave external marks of violence, and might, as in the case of Daft Jamie, lead to a struggle perilous to the assassins themselves; while the combination of both—of the compression of the chest and of the trachea—is equally easy and effectual, and is, moreover, the only mode in which the assassin could accomplish his deadly purpose without leaving traces of his murderous work on the body of his victim.

We pray our readers to compare this description with the mode in which Burke is proved by the evidence on his trial to have proceeded in the murder of Margery Campbell or Docherty. He threw himself upon her body, with his knees upon her chest, to compress the respiratory organs, in the manner above mentioned; and at the same instant he grappled her by the throat: he prevented by his weight the expansion of the ribs, and at the same moment he stopped the canal which communicates with the external air, thus ensuring the almost immediate and easy extinction of his victim. The choking sounds that were heard must have been occasioned by the sudden pressure upon the chest of the unfortunate woman when Burke threw his weight upon her, expelling violently the air contained in the lungs; for after that she could have uttered no sound, and must have died in the gripe of the assassin in the course of two or three minutes. And, in farther illustration of the efficacy of this scientific mode of perpe-

trating murder, we may allude to what is stated and believed to have taken place in the case of Daft Jamie. From his impatience and impetuosity, the assassin missed his intended aim of planting his knees on the breast of the poor victim, and only grappled him by the throat. The consequence was, that the muscles of the chest being unencumbered, and the rest of the body free, the poor creature was able to exert his whole strength—and a desperate, a mortal struggle ensued, in the course of which several severe external wounds were inflicted on him. But had the assassin been as deliberate as in the case of the woman Docherty, the result would have been the same.*

Now, we ask, WHO taught Burke, a common Irish labourer of the very lowest class, to commit murder after a fashion, the science displayed in which is a subject of wonder and dismay to many of the most skilful anatomists in this city, with three of whom we have conversed in regard to it, and found them overwhelmed with horror and amazement? *Who*, we say, taught Burke?—for that he was *tutored* as to the mode of committing the crime, no human being can entertain a shadow of doubt. We will answer the question: IT WAS HARE! But the same question again returns, *who* taught Hare, a person of the very same country and class with Burke? This is a point to be resolved by the Public Prosecutor alone; and we adjure him by the regard he is known to bear to the law, by the solemn pledge which he gave at the late trial in the face of the Court and the country, and by the sacred interests of eternal justice, to lose not a moment in taking steps to have it resolved. With unspeakable astonishment we have learned that Hare is only detained in jail for his own personal protection until after New-Year's-Day. But we cannot permit ourselves to give credit to this statement, notwithstanding we have heard it from quarters where accurate information in regard to such matters is usually obtained. We would fain think it impossible. This subtle fiend was Burke's master in the art of murder, and he has been longer engaged in the trade than his apt scholar, who is now delivered over to justice. We know, too, and are ready to state, where and to whom he offered murdered bodies for sale, recklessly admitting that they had been "popped," or in other words murdered by him and his associates. Daft Jamie was murdered in his house, and in that assassination he was a principal, not an accessary. But it may be said there is no proof. We utterly ridicule this idea. We know there *is* proof, and the mode in which it may be obtained has been pointed out to one of the honourable and learned counsel for the Crown. Two individuals have been named, whose apprehension would lead to the unravelling of the whole of this great mystery of iniquity; from them every information may be obtained necessary to insure the conviction of this monster.

We have heard it alleged that the officers of the Crown became alarmed at the gigantic system of crime which, in the course of their

* That such traces and marks were left on the body of Jamie is sufficiently proved by the fact, that his body was kept four or five days in spirits before it was laid on the dissecting table. The effect of immersion in spirits, we need scarcely say, is to remove the lividity consequent on external bruises or contusions, to corrugate the skin, and to give it all one uniform colour.

inquiries, began to unfold itself; and that, not knowing whither it might lead, or whom it might ultimately implicate, and from a regard to the credit and honour of the country, they have been induced to stop short with the conviction they have already obtained, and to "smother" all further investigation. This, however, is mere stuff. As to the consequences said to be dreaded from pursuing the inquiries which had been opened up, we are sure that we speak the public sentiment when we say, justice ought to be done at whatever cost; and with respect to the honour of the country, we cannot conceive a mode in which it will be more effectually lœsed than by interposing to quash a matter of such terrific magnitude as this, and to leave suspicion to fancy horrors still more appalling than even the dreadful reality.

A contemporary of Monday, speaking of Burke and his associates, says, "This gang of murderers found it neccesary *at times to deceive the anatomists* into a belief that the subjects sold had come from a distance." *No such* DECEPTION *was ever practised!* We have conversed on the subject with three of the most distinguished *anatomists* of Edinburgh, who most solemnly assure us that no such *deception* was ever attempted upon them; and that it could not by possibility have been "practised," because they would have infallibly detected, and as certainly refused every such subject. Moreover, they state that it is impossible to obtain before interment bodies which have died a natural death; at least, that in the course of fifteen years' experience, they have only known two instances in which such bodies were procured. The strongest feelings of human nature, they say, are opposed to it; and even if this were not the case, there are extrinsic difficulties (we need not specify them, as they must be easily divined by all who know any thing of the modes in which the schools of anatomy are *regularly* and *legitimately* supplied) which render it quite impracticable. The inference from this is obvious. Uninterred bodies offered for sale would, from experience of the insuperable difficulty of obtaining them, have roused their suspicion, and prevented the possibility of their being deceived in the manner stated by our contemporary. In illustration of this, we may add that the body of the unfortunate woman Campbell or Docherty, was offered for sale to a most respectable teacher of anatomy in this city, at or near one o'clock in the morning of the 1st November (she had been murdered, as our readers will remember, betwixt eleven and twelve o'clock on the night of the 31st October), that was in less than an hour and a half after she had been murdered; and *fifteen guineas* were demanded for the body; but our friend, after putting a few questions to the fellows who waited upon him, peremptorily and sternly refused to purchase it at any price, or to have any thing whatever to do with it. One of the fellows who waited upon him on this occasion, was a conspicuous witness at the late trial, and stated, upon oath, that all he learned from Burke when he called at the house of the latter about midnight was, that Burke "had something *there* (pointing to the bed) for the doctor, which would be ready in the morning." To the gentleman in question, however, an hour or thereby after the murder was committed, he stated that the body he wished to dispose of was the body of a woman; and that he had "*a desperate gang*" in his pay, through whom he could procure as many subjects as he wished for.

DAVID PATERSON.

(From the "Caledonian Mercury.")

We have received the following communication from Mr. David Paterson, the person who gave evidence at the late trial, and whose name has since been so frequently before the public in connexion with the late horrid transactions. As he insists upon it, we have no objection to give it a place here:

"SIR—I have now long borne with great patience the many false and cruel accusations alleged against me in all the papers, relative to the horrid transactions of Burke and his associates,—I being held forth to the public as one of the most odious characters in existence. I can assure you, Sir, that I have been shamefully wronged; for in all the late allegations against me, I have only kept silence by advice of Dr. Knox, as he was, according to promise, to espouse my cause, and clear my innocence; but which I now find he has most cruelly failed to perform. And I now most solemnly protest, and can prove, that throughout all the services rendered by me to Dr. Knox, I acted entirely under his own guidance and direction.

"I therefore beg thus to address you, as your paper seems to have been the leading one in this affair.

"It has also been most grossly and erroneously reported that I had absconded, and been dismissed from Dr. Knox's service,—all of which I can prove to be false.

"My home is well known to the public authorities: I therefore request, nay, even solicit them (if for one moment they conceive me in any way guilty in this late transaction), to bring me to a public trial, and adduce any evidence they think proper, and either let me be found guilty, or have the benefit of an honourable acquittal.

"This I again earnestly beg to be inserted, being the declaration of an innocent man; and if I am found guilty, let me be punished as the crime deserves, and as innocent, let this suffice to silence the accusations alleged against me, and free me from the public odium which the same has given birth to.—Your immediate notice to this will very much oblige your very humble and obedient servant,

"DAVID PATERSON.

"*Portsburgh, 15th January* 1829."

Now, we have a word or two to say to Mr. David Paterson. And, first of all, we beg to ask him, whether it be true or the reverse, that about one o'clock on the morning of the 1st of November last, he, in conjunction with an individual whom he well knows, offered the body *of a woman* for sale to a highly respectable lecturer on anatomy? Secondly, whether or not he asked *fifteen pounds* for the subject, stating at the same time that Dr. Knox would give only *twelve*? Thirdly, whether he did not say that he wished to have no further dealings with the Doctor, because he had handed over *them* (Paterson and his associate) to his assistants? And, lastly, whether the body so offered was or was not the body of *the woman Docherty*? We request Mr. Paterson to speak to these points, and to afford the public the expla-

nations which, for many reasons, are indispensably necessary. Next, as to our correspondent's dismissal from Dr. Knox's service, we unquestionably stated that fact, upon authority which we conceived unexceptionable; and we afterwards heard it confirmed from Dr. Knox's own lips. We know, in short, that Mr. David Paterson was dismissed from Dr. Knox's service; and if he has the least anxiety about the matter, we can have no objections to tell him the reason. As to Mr. Paterson's supposed absconding, no such statement was ever made in this paper, and he ought therefore to contradict it, if he feels inclined to do so, through the medium of the journal which first gave it publicity.

The second communication of David Paterson it was our original intention *not* to publish, chiefly because it contained no satisfactory answers to the queries we had put to the ostensible writer, and also from motives of delicacy to a respectable individual not at all implicated in the discussions which have lately agitated the public mind. But after what has appeared in the columns of a contemporary of Saturday, as well as the wanton misrepresentations to which our withholding this document has, we understand, given rise, in quarters where we should least of all have expected any misconstruction of our motives, we can no longer hesitate in giving it a place in our columns. Its publication or non-publication was to us individually a matter of no moment whatever; but it may *now* be of importance as affording a standard by which to test the consistency or inconsistency of the writer, and to ascertain what measure of credit is due to the statements which he has caused to be put forth in regard to matters of the deepest interest to the public at large. The following is the communication addressed to ourselves, which we shall place in juxtaposition with that which appeared in the *Courant* of Saturday last.

"To the Editor of the "Caledonian Mercury."

"Sir—After the publication of my letter to you in this day's paper, I observe you have inserted the following queries:—First, whether it be true or the reverse, that about one o'clock of the morning of the 1st November last, I, in conjunction with another individual whom I well knew, offered the body of a woman for sale, to a highly respectable lecturer on anatomy? My answer is simply, No. Secondly, whether or not I asked fifteen pounds for the subject, stating at the same time, that Dr. Knox would give only twelve?—Answer, No. Thirdly, whether I did not say, that I wished to have no farther dealings with the Doctor, because he had handed us over to his (the Dr.'s) assistants? My answer is, No. And lastly, Whether the body so offered, was or was not the body of the woman Docherty? To this I answer, that having no body to offer, the transaction could not take place. But for your and the public satisfaction, I will give what information there is in my possession respecting the queries; to the first I answer, That a friend of the lecturer alluded to called upon me three weeks before the time you have stated, and inquired at me if I knew where the individuals lived that were in the habit of supplying Dr. Knox; but as I did not know, he received no information. At the same time I was aware of the animosity that existed

between the two lecturers, and it was then my opinion that the friend was more on the quiz than in reality; but he still holding forth that it would greatly oblige the lecturer, I said, that the next time I saw the resurrectionists, I would mention it to them, providing Dr. Knox was supplied. The sum offered was about fifteen pounds. To the second query I explain, that the individual who gave the information must not have been aware that I was a servant of Dr. Knox's, and I never made use of the words that Dr. K. would give no more than twelve pounds. I had nothing to do with the purchasing or selling of subjects. To the third query I can give no explanation, not knowing its precise meaning; I can only add, that Dr. Knox was my master, and the assistants had none, nor ever assumed any control over me. To the last query, I again repeat, that having no subject in my possession, I could not make the offer. But about the time alluded to, I did ask the lecturer in question whether he was still inclined to give his friend the large sum formerly offered. He answered in the affirmative, and added, that his rooms would be open all night, to receive any thing his friend (not me) would send. If it is supposed that I was to furnish him with a subject, and that subject the woman Docherty, why should I have desired Burke to go to Dr. Knox's instead of the other lecture-room?

"The statement you give of my dismissal from Dr. Knox, said to have been from his own mouth, stamps ————. Let him put his hand upon his breast, and deny, if he can, that he has not repeatedly solicited me to return to his service; in corroboration of which, I beg to annex his letter to me of Sunday 11th January.

"'DAVID—From your not having come after that I have *thrice* sent for you, I fear that you feel satisfied in your own mind, of not having been faithful at all times to my interests.

"'Still such is my good feeling towards you, that I wish to do every thing in my power to prevent your taking wrong steps—the public clamour is of course much against you, but *all such matters as these subside in a short period,** provided the individuals themselves do not adopt false steps.

"'I think it would be prudent for you to come and see me this evening at nine—for you can have *no ground* for *believing*, since I have never said so, that *I am not concerned in your behalf, and ready to use my utmost exertions for you.* No *prejudice* shall ever be allowed to enter *my mind* against you, unless your own conduct give rise to it.

"'R. KNOX.'

"It is my wish to give the public every information that lies in my power, which will shortly be done by another individual who is more capable than I am; even the secrets yet unknown to the public will be revealed. Your indulging me with the insertion of the above will greatly oblige, your very obedient servant,

"DAVID PATERSON."

Portsburgh, January 17, 1829.

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* It is hoped the Doctor is wrong here: *such matters* cannot *subside* till such time as he *clears himself* to the public satisfaction.

The following is *another* version of the same story, differing, as the reader will perceive, in some most material particulars, from that with which we had been favoured. We have not time at present to point out the discrepancies, which indeed must be apparent to every one who reads both communications; but it is important to observe that Paterson (or the person who writes the letter to which his name is affixed) cautiously avoids giving a *direct* answer to our query, as to whether the body he offered for sale on the morning of the 1st of November last, was the corpse of the woman Campbell or Docherty, and attempts to escape from it by means of an inference as to the probability of his acting in a particular way under the circumstances. Now, this is not a question of probability but of *fact;* and we again ask him, *whose* was the corpse he confessedly offered for sale an hour or an hour and a half *after* Burke had, according to his own evidence in the witness-box, told him that he had "something for the Doctor, which would be ready in the morning?"

"The Caledonian Mercury of the 17th inst. after inserting my letter, has proposed a few queries, which the editor said he would be glad to have answered. To satisfy that gentleman, I answered his queries the same evening, accompanied with a letter I received from Dr. Knox, dated Sunday, 11th January. But it would appear, other matter of the greatest importance has prevented him from giving to the public answers to those queries, and in this case the public may think that I decline answering them. But so far from this being the case, I court inquiry, sensible that the more minutely this affair is examined, the more will it appear that I have been made the scape-goat for a personage in higher life. I also observed in your esteemed paper of the 22d, extracts from a pamphlet in the shape of a letter to the Lord Advocate, with a remark, that that part of the story respecting the offering of a body to another lecturer, has been entirely overlooked in the pamphlet. Allow me here to state, that so much of the pamphlet as relates to me, is perfectly correct; and I am willing to substantiate it upon oath, supported by other proofs. The remarks were made by another individual, who, I have every reason to believe, is in possession of information of greater importance than what has yet transpired. But to the point. I will now give you what I trust the public will consider a *satisfactory* explanation of the transaction alluded to in your paper of the 22d, which will at the same time answer the queries in the Caledonian Mercury of the 17th. About three weeks before the murder of Docherty, a Mr. —— called upon me, who was very intimate (or appeared to be so) with Dr. ——. During the conversation, in a walk along the Bridges, the topic turned upon the scarcity of subjects amongst the lecturers. I was asked how Dr. —— was supplied; and after informing him to the best of my knowledge, he Mr. ——, said that he understood that Dr. —— could not get one, and that he had offered him fifteen pounds if he could get one for him. My answer was, that I thought there was nothing more easy, as there were plenty of resurrection men came about Dr. ——'s rooms, who might procure one for him. He then requested me to accompany him to Dr. ——'s house, and he would ascertain if Dr. —— had got one. I did so. Dr. —— and Mr. —— talked for some time upon various matters, when the discourse turned upon the matter in ques-

tion. I heard Dr. —— offer £15 for a subject, as he was in great strait. *I took no part in the conversation, nor made any remark;* but after we had left Dr. ——, Mr. —— strongly urged me to allow a subject to go to Dr. ——'s, rooms, when any would arrive, without the knowledge of Dr. ——, for which no doubt *I was to receive a remuneration for my trouble.* Dr. —— about that time had fifteen subjects, and I did resolve to allow one to Dr. —— at the first opportunity. Shortly after this time, Burke and Hare brought a subject, but not having an opportunity of speaking to them that night, resolved to do so when I next saw them, or any *other* of the resurrectionists. A few days after a notorious resurrectionist called at the rooms, and informed me that he was going to the country upon business, and inquired if the Dr. was in want of goods. I replied that possibly he might, but that I wanted one for a friend, and would pay him when he returned. The bargain was struck, and he received earnest and a trunk, saying he had two customers before me, and it might be eight or ten days before he could supply me, as the grounds were strictly watched. This passed over, and on Friday evening, the 31st October, a person brought a letter addressed to Mr. ——, Surgeons' Square. This turned out to be from Andrew (or Merry Andrew, as he was styled.) The following is a literal copy:—

" ' *Oct.* 29.

" ' Doctor am in the east, and has ben dein little busnis, am short of siller send out abot aught and twenty shilins way the carer the thing will bee in abot 4 on Saturday mornin its a shuss, hae the plase open.

" ' AND. M————s.'

" Just after I received this letter, I went with Mr. —— to spend the evening, and returned home about twelve o'clock. I found Burke knocking at the door of my lodgings;—what then transpired is fully stated in the pamphlet. After my return from Burke's, which was only a few minutes past twelve o'clock, *I went to bed:* the letter had escaped my memory. I slept none: the suspicions I had entertained of Burke and Hare, and the determination I had come to *to examine the body of the subject they were to send*, and a retrospective view of their late conduct, passed before me. The letter now came into my mind; it was between *three and four o'clock:* I went to Dr.——; did say I expected a subject from his friend: *did not say what place.* The Doctor desired it to be sent to his lecture-rooms, as his assistants were or would be in waiting. He did not refuse it, as has been alleged. The Doctor did not receive it, however, as Mr. Andrew M——s thought proper to address it to another quarter—a very common trick with him, especially if he received part in advance. Now, if, as it has been stated, the woman Docherty was the individual I offered Dr. ——, *why should I urge Burke, as he himself confesses, to take it to Dr.* ——, *if I wished it to have gone to another quarter? How easy could I have done it.* I did not even say to Dr. —— that I had one, therefore could not offer one; but did say that one was expected, for the truth of which I appeal to that gentleman. Various recent circumstances made me very suspicious of the manner Burke obtained his subjects, and I again avow it, that at all hazards I was determined to examine the body of the first subject

they brought, and satisfy myself upon that point. *I confess that the circumstance of the subject coming from the east at the nick of time Docherty was murdered* LOOKS RATHER SUSPICIOUS. But when I inform you that I have seen three subjects at the same time of day sent to the lecture-room from different quarters, your suspicions will cease. I have another witness to prove the truth of my allegations, which, taken with the confession of Burke, and the evidence of Hare, will be sufficient to satisfy any unbiassed mind *that Docherty could not be the subject intended for Dr.* ——.

"With regard to the paragraph in the Caledonian Mercury, stating that they had heard from Dr. Knox's own mouth that he had turned me out of his service, I answer, that Dr. Knox has since sent for me, and expressed the most friendly intentions towards me, which I can prove by a letter received from him. This document I am ready to shew, which will speak for itself. But this is not all. The public shall be made acquainted with facts they little expected to hear. I understand that —— has traced out other individuals that have been murdered, their names, descriptions, and designations, the times and places where they were committed; and from an examination I underwent before him, it is but too true that I can vouch for the identity of such persons after they were dead. I understand he is in possession of the names and descriptions of two of Burke's accomplices, and all the information in my power shall be at his service.

(Signed) "DAVID PATERSON.

"*Portsburgh, 23d January* 1829."

[The following, which is the joint statement of Dr. Knox's principal assistants, in reference to the situation actually held by David Paterson in the Doctor's service, as well as his late proceedings, had been handed to us for publication, and, in justice to these young gentlemen, we think it right to give it a place in our columns.]

"It is amazing with what effrontery this person has contrived to push himself into the notice of the public under the feigned character of '*Keeper of the Museum belonging to Dr. Knox,*'* '*Assistant to Dr. Knox,*' *&c. &c.* The facts stand thus:—David Paterson was never in his life entrusted with the keys of the museum, and had nothing at all to do with it; the keys being kept by Dr. Knox, and the management entrusted to a gentleman who has a salary of £195 a-year. David Paterson was nothing more than *a menial servant, hired by the week at 7s., and dismissable at pleasure;* his duties being those generally and in other lecture-rooms performed by scavengers or porters—such as keeping the door, cleaning and sweeping out the rooms, putting on and mending the fires, scrubbing the tables, and carrying away and burying the offals of the dissecting-rooms; washing and cleaning subjects preparatory to their being brought into the class-room; attending on the students, and doing little jobs for them —such as cleaning and scraping bones, getting their dissecting clothes washed, which was done by his mother and sister; he had likewise to

* Paterson was cited *as such* in the list of witnesses, and gave his *evidence* accordingly.

go messages, and be *ready at all times to receive packages*, and go for them.

"With regard to his connexion with Burke and Hare, he was so far associated with them, that he was on the eve of entering into an agreement with one of these miscreants to accompany him to Ireland. that they might (as he said) procure a greater supply of subjects and at a less price, the people being poorer there.

"This is the person who presumes to address the Lord Advocate of Scotland!* This is the person who says he had nothing to do with subjects or the dissecting-room! This is the person who pretends to have had no connexion with Burke and Hare, although he was going to enter into an agreement with one of them, and become his partner, and intended, nay, actually tried, to make a profit on the subjects procured from them, by bargaining with another lecturer for a higher price than his master was willing to give (thus committing a shameful breach of trust.) This is the person who says he suspected Burke and Hare, and determined to watch them! And this is the person who said that the body of the woman Docherty presented marks of violence; yet this was the same body, to sell which he was in treaty with a lecturer for £15, saying his master would not give more than £12."

CONFESSIONS OF BURKE.

(From the "Edinburgh Advertiser.")

The Lord Advocate having considered it proper that the public should be put in possession of these confessions, they were accordingly transmitted by the sheriff, along with the following letter, to the Lord Provost:—

Sheriff's Office, Edinburgh, Feb. 5, 1829.

My Lord Provost—As it is now fully understood that all proceedings of a criminal nature against William Hare have terminated, it has appeared to the Lord Advocate that the community have a right to expect a disclosure of the contents of the confessions made by William Burke after his conviction. I have, therefore, been directed to place those confessions in your Lordship's hands with the view to their being given to the public, at such a time, and in such a manner, as you may deem most advisable.

Your Lordship is already aware that the first of these confessions was taken by the sheriff-substitute, on the 3d of January last, in consequence of Burke having intimated a wish to that effect. The second was taken on the 22d of the same month, a few days before Burke's execution; and in order to give it every degree of authenticity, Mr. Reid, a Roman Catholic priest, who had been in regular attendance on Burke, was requested to be present.

It may be satisfactory to your Lordship to know, that in the infor-

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* A Letter by "The Echo of Surgeons' Square," and attributed to Paterson, was addressed to the Lord Advocate, "disclosing the accomplices, secrets, and other facts relative to the late murders," &c.

mation which Hare gave to the sheriff on the 1st December last (while he imputed to Burke the active part in those deeds which the latter now assigns to Hare), Hare disclosed nearly the same crimes in point of number, of time, and of the description of persons murdered, which Burke has thus confessed; and in the few particulars in which they differed, no collateral evidence could be obtained calculated to show which of them was in the right.

Your Lordship will not be displeased to learn, that after a very full and anxious inquiry, now only about to be concluded, no circumstances have transpired, calculated to show that any other persons have lent themselves to such practices in this city, or its vicinity; and that there is no reason to believe that any other crimes have been committed by Burke and Hare, excepting those contained in the frightful catalogue to which they have confessed.

In concluding, I need hardly suggest to your Lordship the propriety of not making those confessions public until such time as you are assured that Hare has been actually liberated from jail.—I have the honour to be, my Lord, your Lordship's most obedient humble servant, AD. DUFF.

The Right Hon. the Lord Provost, &c. &c.

CONFESSIONS OF BURKE IN THE JAIL.

Present—Mr. George Tait, Sheriff-substitute; Mr. Archibald Scott, Procurator-fiscal; Mr. Richard J. Moxey, Assistant Sheriff-clerk.

Edinburgh, 3d January 1829.

Compeared William Burke, at present under sentence of death in the jail of Edinburgh, states that he never saw Hare till the Hallow-fair before last (November 1827), when he and Helen M'Dougal met Hare's wife, with whom he was previously acquainted, on the street: they had a dram, and he mentioned he had an intention to go to the west country to endeavour to get employment as a cobbler; but Hare's wife suggested that they had a small room in their house which might suit him and M'Dougal, and that he might follow his trade of a cobbler in Edinburgh; and he went to Hare's house, and continued to live there, and got employment as a cobbler.

An old pensioner, named Donald, lived in the house about Christmas 1827; he was in bad health, and died a short time before his quarter's pension was due: that he owed Hare £4; and a day or two after the pensioner's death, Hare proposed that his body should be sold to the doctors, and that the declarant should get a share of the price. Declarant said it would be impossible to do it, because the man would be coming in with the coffin immediately; but after the body was put into the coffin, and the lid was nailed down, Hare started the lid with a chisel, and he and declarant took out the corpse and concealed it in the bed, and put tanner's bark from behind the house into the coffin, and covered it with a sheet, and nailed down the lid of the coffin, and the coffin was then carried away for interment. That Hare did not appear to have been concerned in any thing of the kind before, and seemed to be at a loss how to get the body disposed of; and he and Hare went in the evening to the yard of the College, and saw a person like a student there, and the de-

clarant asked him if there were any of Dr. Monro's men about; because he did not know there was any other way of disposing of a dead body—nor did Hare. The young man asked what they wanted with Dr. Monro, and the declarant told him that he had a subject to dispose of, and the young man referred him to Dr. Knox, No. 10, Surgeon Square; and they went there, and saw young gentlemen, whom he now knows to be Jones, Miller, and Ferguson, and told them that they had a subject to dispose of, but *they did not ask how they had obtained it;* and they told the declarant and Hare to come back when it was dark, and that they themselves would find a porter to carry it. Declarant and Hare went home and put the body into a sack, and carried it to Surgeon Square, and not knowing how to dispose of it, laid it down at the door of the cellar, and went up to the room, where the three young men saw them, and told them to bring up the body to the room, which they did; and they took the body out of the sack, and laid it on the dissecting-table: That *the shirt was on the body, but the young men asked no questions as to that;* and the declarant and Hare, at their desire, took off the shirt, and got £7 : 10s. *Dr. Knox came* in after the shirt was taken off, *and looked at the body,* and proposed they should get £7 : 10s., and authorized Jones to settle with them; and *he asked no questions as to how the body had been obtained.* Hare got £4 : 5s. and the declarant got £3 : 5s. Jones, &c. said that *they would be glad to see them again when they had any other body to dispose of.*

Early last spring, 1828, a woman from Gilmerton came to Hare's house as a nightly lodger,—Hare keeping seven beds for lodgers: That she was a stranger, and she and Hare became merry, and drank together; and next morning she was very ill in consequence of what she had got, and she sent for more drink, and she and Hare drank together, and she became very sick and vomited; and at that time she had not risen from bed, and Hare then said that they would try and smother her in order to dispose of her body to the doctors:* That she was lying on her back in the bed, and quite insensible from drink, and Hare clapped his hand on her mouth and nose, and the declarant laid himself across her body, in order to prevent her making any disturbance—and she never stirred; and they took her out of bed and undressed her, and put her into a chest; and they mentioned to Dr. Knox's young men that they had another subject, and Mr. Miller *sent a porter to meet them* in the evening at the back of the Castle; and declarant and Hare carried the chest till they met the porter, and they accompanied the porter with the chest to Dr. Knox's class-room, and Dr. Knox came in when they were there: the body was cold and stiff. *Dr. Knox approved of its being so fresh, but did not ask any questions.*

The next was a man named Joseph,† a miller, who had been lying

* When the reader notices what is printed above in *italics*, he will see that the *facility* with which Burke and Hare got a *purchaser* for the *body* of Donald, and the *desire* to "see them again when they had *any other body to dispose of*," must have been great *inducements* to such miscreants to *commence* their career of *murder*.

† Hare gave the same account as Burke of the number, and the same description of the victims; but they differ in the order of time in which the murders

badly in the house: That he got some drink from declarant and Hare, but was not tipsy: he was very ill, lying in bed, and could not speak sometimes, and there was a report on that account that there was fever in the house, which made Hare and his wife uneasy in case it should keep away lodgers, and they (declarant and Hare) agreed that they should suffocate him for the same purpose; and the declarant got a small pillow and laid it across Joseph's mouth, and Hare lay across the body to keep down the arms and legs; and *he was disposed of in the same manner, to the same persons,* and the body was carried by the porter who carried the last body.

In May 1828, as he thinks, an old woman came to the house as a lodger, and she was the worse of drink, and she got more drink of her own accord, and she became very drunk, and declarant suffocated her; and Hare was not in the house at the time; and *she was disposed of in the same manner.*

Soon afterwards an Englishman lodged there for some nights, and was ill of the jaundice: that he was in bed very unwell, and Hare and declarant got above him and held him down, and by holding his mouth suffocated him, and *disposed of him in the same manner.*

Shortly afterwards an old woman named Haldane, (but he knows nothing farther of her) lodged in the house, and she had got some drink at the time, and got more to intoxicate her, and he and Hare suffocated her, and *disposed of her in the same manner.*

Soon afterwards a cinder woman came to the house as a lodger, as he believes, and she got drink from Hare and the declarant, and became tipsy, and she was half asleep, and he and Hare suffocated her, and *disposed of her in the same manner.*

About Midsummer 1828, a woman, with her son or grandson, about twelve years of age, and who seemed to be weak in his mind, came to the house as lodgers; the woman got a dram, and when in bed asleep, he and Hare suffocated her: and the boy was sitting at the fire in the kitchen, and he and Hare took hold of him, and carried him into the room, and suffocated him. THEY WERE PUT INTO A HERRING BARREL THE SAME NIGHT, AND CARRIED TO DR. KNOX'S ROOMS.

That, soon afterwards, the declarant brought a woman to the house as a lodger; and after some days she got drunk, and *was disposed of in the same manner:* That declarant and Hare generally tried if lodgers would drink, and if they would drink, they were disposed of in that manner.

The declarant then went for a few days to the house of Helen M'Dougal's father, and when he returned, he learned from Hare that *he had disposed of a woman* in the declarant's absence, *in the same*

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were committed. He stated, with great probability, that the body of Joseph the miller was the second sold (that of the old pensioner being the first), and of course he was the first man murdered. Burke, with less likelihood, asserts, as above, that the first murder was that of the female lodger. We are apt to think Hare was right; for there was an additional motive to reconcile them to the deed in the miller's case,—the fear that the apprehensions entertained through the fever would discredit the house, and the consideration that there was, as they might think, less crime in killing a man who was to die at any rate. It is not odd that Burke, acted upon, as he seems always to have been, by ardent spirits, and involved in a constant succession of murder, should have misdated the two actions.

manner, in his own house; but the declarant does not know the woman's name, or any farther particulars of the case, or whether any other person was present or knew of it.

That about this time he went to live in Broggan's house, and a woman, named Margaret Haldane, daughter of the woman Haldane before mentioned, and whose sister is married to Clark, a tinsmith in the High Street, came into the house, but the declarant does not remember for what purpose; and she got drink, and *was disposed of in the same manner:* That Hare was not present, and neither Broggan nor his son knew the least thing about that or any other case of the same kind.

That in April 1828, he fell in with the girl Paterson and her companion in Constantine Burke's house, and they had breakfast together, and he sent for Hare, and he and Hare disposed of her in the same manner; and Mr. Ferguson and a tall lad, who seemed to have known the woman by sight, asked where they had got the body; and the declarant said he had purchased it from an old woman at the back of the Canongate. *The body was disposed of five or six hours after the girl was killed,* and *it was cold, but not very stiff,* but he does not recollect of any remarks being made about the body being warm.

One day in September or October 1828, a washer-woman had been washing in the house for some time, and he and Hare suffocated her, and *disposed of her in the same manner.*

Soon afterwards, a woman named M'Dougal, who was a distant relation of Helen M'Dougal's first husband,* came to Broggan's house to see M'Dougal; and after she had been coming and going to the house for a few days, she got drunk, and was served in the same way by the declarant and Hare.

That "Daft Jamie" was then disposed of in the manner mentioned in the indictment, except that Hare was concerned in it. That Hare was lying alongside of Jamie in the bed, and Hare suddenly turned on him, and put his hand on his mouth and nose; and Jamie, who had got drink, but was not drunk, made a terrible resistance, and he and Hare fell from the bed together, Hare still keeping hold of Jamie's mouth and nose; and as they lay on the floor together, declarant lay across Jamie, to prevent him from resisting, and they held him in that state till he was dead, and he was disposed of in the same manner: and Hare took a brass snuff-box and a spoon from Jamie's pocket, and kept the box to himself, and never gave it to the declarant —but he gave him the spoon.

And the last was the old woman Docherty, for whose murder he has been convicted. That she was not put to death in the manner deponed to by Hare on the trial. That during the scuffle between him and Hare, in the course of which he was nearly strangled by Hare, Docherty had crept among the straw, and after the scuffle was over, they had some drink, and after that they both went forward to where the woman was lying sleeping, and Hare went forward first, and seized her by the mouth and nose, as on former occasions; and

* It is certain that Helen *M'Dougal* (or rather *Dougal*, for that is her *proper* name), never was *married*: she absconded from home with a married man of the name of M'Dougal, long before she knew Burke, and had two children by him: he is the father of Gray's wife.

at the same time the declarant lay across her, and she had no opportunity of making any noise; and before she was dead, one or other of them, he does not recollect which, took hold of her by the throat. That while he and Hare were struggling, which was a real scuffle, M'Dougal opened the door of the apartment, and went into the inner passage and knocked at the door, and called out police and murder, but soon came back; and at the same time Hare's wife called out never to mind, because the declarant and Hare would not hurt one another. That whenever he and Hare rose and went towards the straw where Docherty was lying, M'Dougal and Hare's wife, who, he thinks, were lying in bed at the time, or, perhaps, were at the fire, immediately rose and left the house, but did not make any noise, so far as he heard, and he was surprised at their going out at that time, because he did not see how they could have any suspicion of what they (the declarant and Hare) intended doing. That he cannot say whether he and Hare would have killed Docherty or not, if the women had remained, because they were so determined to kill the woman, the drink being in their head;—and *he has no knowledge or suspicion of Docherty's body having been offered to any person besides Dr. Knox;* and he does not suspect that Paterson would offer the body to any other person than Dr. Knox.

Declares, That suffocation was not suggested to them by any person as a mode of killing, but occurred to Hare on the first occasion before mentioned, and was continued afterwards because it was effectual, and showed no marks; and when they lay across the body at the same time, that was not suggested to them by any person, for they never spoke to any person on such a subject; and it was not done for the purpose of preventing the person from breathing, but was only done for the purpose of keeping down the person's arms and thighs, to prevent the person struggling.

Declares, That with the exception of the body of Docherty, they never took the person by the throat, and they never leapt upon them; and declares that there were no marks of violence on any of the subjects, and they were sufficiently cold to prevent any suspicion on the part of the Doctors; and, *at all events, they might be cold and stiff enough before the box was opened up,* and he and Hare always told some story of their having purchased the subjects from some relation or other person who had the means of disposing of them, about different parts of the town, and the statements which they made were such as to prevent the Doctors having any suspicions; and NO SUSPICIONS WERE EXPRESSED BY DR. KNOX OR ANY OF HIS ASSISTANTS, AND NO QUESTIONS ASKED TENDING TO SHOW THAT THEY HAD SUSPICION.

Declares, That Helen M'Dougal and Hare's wife were no way concerned in any of the murders, and neither of them knew of any thing of the kind being intended, even in the case of Docherty; and although these two women may latterly have had some suspicion in their own minds that the declarant and Hare were concerned in lifting dead bodies, he does not think they could have any suspicion that he and Hare were concerned in committing murders.

Declares, *That none of the subjects which they had procured, as before mentioned, were offered to any other person than Dr. Knox's assistants,* and he and Hare had very little communication with Dr.

Knew himself; and declares, that he has not the smallest suspicion of any other person in this, or in any other country, except Hare and himself, being concerned in killing persons and offering their bodies for dissection; and he never knew or heard of such a thing having been done before.

WM. BURKE.
G. TAIT.

Present, Mr. Geo. Tait, Sheriff-Substitute; Mr. Archibald Scott, Procurator-Fiscal; Mr. Richard J. Moxey, Assistant-Sheriff-Clerk; the Rev. William Reid, Roman Catholic Priest.

Edinburgh 22d January 1829.

Compeared William Burke, at present under sentence of death in the gaol of Edinburgh, and his declaration, of date the 3d current, being read over to him, he adheres thereto. Declares further, that he does not know the names and descriptions of any of the persons who were destroyed except as mentioned in his former declaration. Declares, that he never was concerned in any other act of the same kind, nor made any attempt or preparation to commit such, and all reports of a contrary tendency, some of which he has heard, are groundless. And he does not know of Hare being concerned in any such, except as mentioned in his former declaration; and he does not know of any persons being murdered for the purpose of dissection by any other persons than himself and Hare, and if any persons have disappeared any where in Scotland, England, or Ireland, he knows nothing whatever about it, and never heard of such a thing till he was apprehended. Declares, that he never had any instruments in his house except a common table knife, or a knife used by him in his trade as a shoemaker, or a small pocket knife, and he never used any of those instruments, or attempted to do so, on any of the persons who were destroyed. Declares, that neither he nor Hare, so far as he knows, ever were concerned in supplying any subjects for dissection except those before mentioned; and, in particular, never did so by raising dead bodies from the grave. Declares, that they never allowed Dr. Knox, or any of his assistants, to know exactly where their houses were, but Paterson, Dr. Knox's porter or door-keeper, knew. And this he declares to be truth.*

WM. BURKE.
G. TAIT.

CONFESSIONS OF BURKE,

AS AUTHENTICATED BY HIS OWN SIGNATURE.

(From the "Edinburgh Evening Courant.")

The following is the document which we have had for some time in our possession. The words printed in Italics were added by himself (Burke) in the MS.

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* At the time Burke was under examination by the Sheriff, he (Burke) remarked to a gentleman who happened to see him, "that the murders never

Abigail Simpson was murdered on the 12th February 1828, on the forenoon of the day. She resided in Gilmerton, near Edinburgh; has a daughter living there. She used to sell salt and camstone. She was decoyed in by Hare and his wife on the afternoon of the 11th February, and he gave her some whisky to drink. She had one shilling and sixpence, and a can of kitchen-fee. Hare's wife gave her one shilling and sixpence for it; she drank it all with them. She then said she had a daughter. Hare said he was a single man, and would marry her, and get all the money amongst them. They then proposed to her to stay all night, which she did, as she was so drunk she could not go home; and in the morning was vomiting. They then gave her some porter and whisky, and made her so drunk that she fell asleep on the bed. Hare then laid hold of her mouth and nose, and prevented her from breathing. Burke held her hands and feet till she was dead. She made very little resistance, and when it was convenient they carried her to Dr. Knox's dissecting-rooms in Surgeon Square, and got ten pounds for her. She had on a drab mantle, a white-grounded cotton shawl and small blue spots on it. Hare took all her clothes and went out with them; said he was going to put them into the canal. She said she was a pensioner of Sir John Hay's. (Perhaps this should be Sir John Hope.)

The next was an Englishman, a native of Cheshire, and a lodger of Hare's. They murdered him in the same manner as the other. He *was* ill with *the* jaundice at the same time. He was very tall; had black hair, brown whiskers, mixed with grey hairs. He used to sell spunks in Edinburgh; was about forty years of age. Did not know his name. *Sold to Dr. Knox for* £10.

The next was an old woman who lodged with Hare for one night, but does not know her name. She was murdered in the same manner as above. *Sold to Dr. Knox for* £10. The old woman was decoyed into the house by Mrs. Hare in the forenoon from the street when Hare was working at the boats at the canal. She gave her whisky, and put her to bed three times. At last she was so drunk that she fell asleep; and when Hare came home to his dinner, he put part of the bed-tick on her mouth and nose, and when he came home at night she was dead. Burke at this time was mending shoes; and Hare and Burke took the clothes off her, and put her body into a tea-box. Took her to Knox's that night.

The next was Mary Paterson, who was murdered in Burke's brother's house in the Canongate, in the month of April last, by Burke and Hare, in the forenoon. She was put into a tea-box, and carried to Dr. Knox's dissecting-rooms in the afternoon of the same day; and got £8 for her body. SHE HAD TWOPENCE HALFPENNY, WHICH SHE HELD FAST IN HER HAND. Declares that the girl Paterson was only four hours dead till she was in Knox's dissecting-rooms; but she was not dissected at that time, for she was three months in whisky before she was dissected. SHE WAS WARM WHEN BURKE CUT THE HAIR OFF

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would have been discovered, had Gray not found the body of Docherty among the straw." The public satisfaction in the integrity of Gray has been manifested by a subscription in his favour, (which, however, has amounted to very little), and by his admission into the Police Establishment of Edinburgh, in which he has already given earnest of becoming an active and intrepid officer.

HER HEAD; and Knox brought a Mr. ——, a painter, to look at her, she was so handsome a figure, and well shaped in body and limbs. One of the students said she was like a girl he had seen in the Canongate as one pea is like to another. They desired Burke to cut off her hair; ONE OF THE STUDENTS GAVE A PAIR OF SCISSORS FOR THAT PURPOSE.*

In June last, an old woman and a dumb boy, her grandson, from Glasgow, came to Hare's, and were both murdered at the *dead* hour of night, when the woman was in bed. Burke and Hare murdered her the same way as they did the others. They took off the bed-clothes and tick, stripped off her clothes, and laid her on the bottom of the bed, and then put on the bed-tick, and bed-clothes on the top of her; and they then came and took *the boy* in their arms and carried him ben to the room, and murdered him in the same manner, and *laid* him alongside of his grandmother. They lay for the space of an hour; they then put them into a herring barrel. The barrel was perfectly dry; there was no brine in it. They carried them to the stable till next day; they put the barrel into Hare's cart, and Hare's horse was yoked in it; but the horse would not drag the cart one foot past the Meal-market; and they got a porter with a hurley, and put the barrel on it. Hare and the porter went to Surgeon Square with it. Burke went before them, as he was afraid something would happen, as the horse would not draw them. When they came to Dr. Knox's dissecting rooms, Burke carried the barrel in his arms. The students and them had hard work to get them out, being so stiff and cold. They received £16 for them both. Hare was taken in by the horse he bought that refused drawing the corpse to Surgeon Square, and they shot it in the tan-yard. He had two large holes in his shoulder stuffed with cotton, and covered over with a piece of another horse's skin to prevent them being discovered.

Joseph, the miller by trade, and a lodger of Hare's. He had once been possessed of a good deal of money. He was connected by marriage with some of the Carron Company. Burke and Hare murdered him by pressing a pillow on his mouth and nose till he was dead. He was then carried to Dr. Knox's in Surgeon Square. They got £10 for him.

Burke and Helen M'Dougal were on a visit seeing their friends near Falkirk. This was at the time a procession was made round a stone in that neighbourhood; thinks it was the anniversary of the battle of Bannockburn. When he was away, Hare fell in with a woman drunk in the street at the West Port. He took her into his house and murdered her himself, and sold her to Dr. Knox's assistants for £8. When Burke went away he knew Hare was in want of money; his things were all in pawn; but when he came back, found him have plenty of money. Burke asked him if he had been doing any business, he said he had been doing nothing. Burke did not believe him, and went to Dr. Knox, who told him that Hare had brought a subject. Hare then confessed what he had done.

A cinder-gatherer; *Burke* thinks her name was Effy. She was in the habit of selling small pieces of leather to him, *(as he was a*

* What do *Dr. Knox* and his *principal assistants* say to this statement?

cobbler), she gathered about the coach-works. He took her into Hare's stable, and gave her whisky to drink till she was drunk; she then lay down among some straw and fell asleep. They then laid a cloth over her. Burke and Hare murdered her as they *did the* others. She was then carried to Dr. Knox's; Surgeon Square, and sold for £10.

Andrew Williamson, a policeman, and his neighbour, were dragging a drunk woman to the West Port watch-house. They found her sitting on a stair. Burke said, "Let the woman go to her lodgings." They said they did not know where she lodged. Burke then said he would take her to lodgings. They then gave her to his charge. He then took her to Hare's house. Burke and Hare murdered her that night the same way as they did the others. They carried her to Dr. Knox's in Surgeon Square, and got £10.

Burke being asked, did the policemen know him when they gave him this drunk woman into his charge? He said he had a good character with the police; or if they had known that there were four murderers living in one house they would have visited them oftener.

James Wilson, commonly *called* Daft Jamie. Hare's *wife* brought him in from the street into her house. Burke was at the time getting a dram in Rymer's shop. He saw her take Jamie off the street, bare-headed and bare-footed. After she got him into her house, and left him with Hare, she came to Rymer's shop for a pennyworth of butter, and Burke was standing at the counter. She asked him for a dram; and in drinking it she stamped him on the foot. He knew immediately what she wanted him for, and he then went after her.* When in the house, she said, you have come too late, for the drink is all done; and Jamie had the cup in his hand. He had never seen him before to his knowledge. They then proposed to send for another half mutchkin, which they did, and urged him to drink; she took a little with them. They then invited him ben to the little room, and advised him to sit down upon the bed. Hare's wife then went out, and locked the outer door, and put the key below the door. There were none in the room but themselves three. Jamie sat down upon the bed. He then lay down upon the bed, and Hare lay down at his back, his head raised up and resting upon his left hand. Burke was standing at the foreside of the bed. When they had lain there for some time, Hare threw his body on the top of Jamie, pressed his hand on his mouth, and held his nose with his other. Hare and him fell off the bed and struggled. Burke then held his hands and feet. They never quitted their gripe till he was dead. He never got up nor cried any. When he was dead, Hare felt his pockets, and took out a brass snuff-box and a copper snuff-spoon. He gave the spoon to Burke, and kept the box to himself. Sometime after, he said he threw the box away in the tan-yard; and the brass-box that was libelled against Burke in the Sheriff's-office was Burke's own box. It was after breakfast Jamie was enticed in, and he was murdered by twelve o'clock in the day. BURKE DECLARES, THAT MRS. HARE

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* This statement is *decisive* as respects the *criminality* of the *female fiend* Hare's wife.

LED POOR JAMIE IN AS A DUMB LAMB TO THE SLAUGHTER, AND AS A SHEEP TO THE SHEARERS; and he was always very anxious making inquiries for his mother, and was told she would be there immediately. He does not think he drank above one glass of whisky all the time. He was then put into a chest that Hare kept clothes in; and they carried him to Dr. Knox's, in Surgeon Square, that afternoon, and got £10 for him. Burke gave Daft Jamie's clothes to his brother's children; they were almost naked; and when he untied the bundle they were like to quarrel about them. The clothes of the other murdered persons were generally destroyed, to prevent detection.

Ann M'Dougal, a cousin of Helen M'Dougal's former husband. She was a young woman, and married, and had come on a visit to see them. Hare and Burke gave her whisky till she was drunk, and when in bed and asleep, Burke told Hare that he would have most to do to her, as she being a distant friend, he did not like to begin first on her. Hare murdered her by stopping her breath, and Burke assisted him the same way as the others. ONE OF DR. KNOX'S ASSISTANTS, *Paterson*, GAVE THEM A FINE TRUNK TO PUT HER INTO. It was in the afternoon when she was done. It was in John Broggan's house; and when Broggan came home from his work he saw the trunk, and made inquiries about it, as he knew they had no trunks there. Burke then gave him two or three drams, as there was always plenty of whisky going at these times, to make him quiet. Hare and Burke then gave him £1 : 10s. each, as he was back in his rent, for to pay it, and he left Edinburgh a few days after. They then carried her to Surgeon Square as soon as Broggan went out of the house, and got £10 for her. Hare was cautioner for Broggan's rent, being £3, and Hare and Burke gave him that sum. Broggan went off in a few days, and the rent is not paid yet. They gave him the money that he might not come against them for the murder of Ann M'Dougal, that he saw in the trunk, that was murdered in his house. Hare thought that the rent would fall upon him, and if he could get Burke to pay the half of it, it would be so much the better; and proposed this to Burke, and he agreed to it, as they were glad to get him out of the way. Broggan's wife is a cousin of Burke's. They thought he went to Glasgow, but are not sure.

Mrs. Haldane, a stout old woman, who had a daughter transported last summer from the Calton jail for fourteen years, and has another daughter married to ——, in the High Street. She was a lodger of Hare's. She went into Hare's stable; the door was left open, and she being drunk, and falling asleep among some straw, Hare and Burke murdered her the same way as they did the others, and kept the body all night in the stable, and took her to Dr. Knox's next day. She had but one tooth in her mouth, and that was a very large one in front.

A young woman, a daughter of Mrs. Haldane, of the name of Peggy Haldane, was drunk, and sleeping in Broggan's house, was murdered by Burke himself, in the forenoon. Hare had no hand in it. She was taken to Dr. Knox's in the afternoon in a tea-box, and £8 got for her. She was so drunk at the time that he thinks she was not sensible of her death, as she made no resistance whatever. She and her mother were both lodgers of Hare's, and they were both of

took him to the College first; they saw a man there, and asked for Dr. Monro, or any of his men; the man asked what they wanted, or had they a subject; they said they had. He then ordered them to call at 10, Dr. Knox's, in Surgeon Square, and he would take it from them, which they did. They got £7 : 10s. for him. That was the only subject they sold that they did not murder; and getting that high price made them try the murdering for subjects.

Burke is thirty-six years of age, was born in the parish of Orrey, county Tyrone; served seven years in the army, most of that time as an officer's servant in the Donegal militia; he was married at Ballinha, in the county of Mayo, when in the army, but left his wife and two children in Ireland. She would not come to Scotland with him. He has often wrote to her, but got no answer; he came to Scotland to work at the Union Canal, and wrought there while it lasted; he resided for about two years in Peebles, and worked as a labourer. He wrought as weaver for eighteen months, and as a baker for five months; he learned to mend shoes, as a cobbler, with a man he lodged with in Leith; and he has lived with Helen M'Dougal about ten years, until he and she were confined in the Calton Jail, on the charge of murdering the woman of the name of Docherty or Campbell, and both were tried before the High Court of Justiciary in December last. Helen M'Dougal's charge was found not proven, and Burke found guilty, and sentenced to suffer death on the 28th January.

Declares, that Hare's servant girl could give information respecting the murders done in Hare's house, if she likes. She came to him at Whitsunday last, went to harvest, and returned back to him when the harvest was over. She remained until he was confined along with his wife in the Calton Jail. She then sold twenty-one of his swine for £3, and absconded. She was gathering potatoes in a field that day Daft Jamie was murdered; she saw his clothes in the house when she came home at night. Her name is Elizabeth M'Guier or Mair.* Their wives saw that people came into their houses at night, and went to bed as lodgers, but did not see them in the morning, nor did they make any inquiries after them. They certainly knew what became of them, although Burke and Hare pretended to the contrary. Hare's wife often helped Burke and Hare to pack the murdered bodies into the boxes. HELEN M'DOUGAL NEVER DID, NOR SAW THEM DONE; BURKE NEVER DURST LET HER KNOW; he used to smuggle and drink, and get better victuals unknown to her; he told her he bought dead bodies, and sold them to doctors, and that was the way they got the name of resurrection-men.

" Burk deaclars that docter Knox never incoureged him, nither taught or incoregd him to murder any person, nether any of his asistents, that worthy gentleman Mr. Fergeson was the only man that ever mentioned any thing about the bodies. He inquired where we got that yong woman Paterson.

(Sined) *" WILLIAM BURK, prisoner."*†

Condemned Cell, January 21, 1819.

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* She is a native of Ireland, as we are well informed.

† While Burke was in the Lock-up-house, the evening before his execution, he signed a paper, in which he says, " The document, or narrative, which I signed

EXECUTION OF BURKE.

Shortly after mid-day of Tuesday the 27th January, preparations commenced at the place of execution. Strong poles were fixed in the street, to support the chain by which the crowd was kept at due distance, and on this occasion the space enclosed was considerably larger than usual. By half-past ten o'clock at night, the frame of the gibbet was brought to the spot; and, as the night was very wet, there was no time lost by the workmen, and by 12 o'clock, the whole preparations in this department were completed. So exceedingly anxious were all ranks, that in utter disregard of the "pelting of the pitiless storm," the operatives were constantly surrounded by a great assemblage. When their labours were finished, *the crowd evinced their abhorrence of the monster Burke, and all concerned in the West Port murders, by three tremendous cheers.*

About four o'clock on Tuesday morning, he was taken in a coach from the jail on the Calton Hill to the Lock-up, a prison immediately adjacent to the place of execution.

At a very early hour on Wednesday morning, although the rain fell in torrents, the people began to assemble; and by eight o'clock, one of the densest crowds had collected ever witnessed on the streets of Edinburgh—certainly there were not fewer than from 20,000 to 25,000 spectators. Every window and house-top from which a glimpse of the criminal could be obtained was occupied. For some days previous, great interest had been used to obtain windows commanding a full view of the scaffold,—the cost varying according to the local position, from five to twenty shillings. Crowds of people continued to arrive, not only from all parts of the city, but from all the neighbouring towns. The scene at this time was deeply impressive. No person could without emotion survey such a vast assemblage, so closely wedged together, gazing on the fatal apparatus, and waiting in anxious and solemn silence the arrival of the worst of murderers.

Burke slept soundly a great part of Tuesday night, and when he awoke, expressed some anxiety to have his irons struck off, which was done about half-past five o'clock. When holding up his leg, and when the fetters fell off, he said, "So may all my earthly chains fall!" At a previous part of the morning, he held up his hand, and with much apparent earnestness, said, "Oh that the hour was come which shall separate me from this world!" About half-past six o'clock, the two Catholic clergymen (the Rev. Messrs. Reid and Stewart) entered the Lock-up-House, and the former immediately waited upon the criminal in his cell. At seven o'clock, he walked into the keeper's room, with a firm step, followed by Mr. Reid, and took his seat in an arm-chair

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for ——— Ewart, was correct, so far as I had time to examine it; but it was given under the express stipulation that it should not be published for three months after my decease. I authorize ——— ——— to insist upon the delivery of the paper above alluded to from the *Courant* office, or any other person in whose possession it may be; and, at same time, I desire Bailie Small to be present when the papers are demanded and got up, and that they may be taken to the Sheriff's Office, and compared with my declaration made before the sheriff, which is the only full statement that can be relied on."—And this is witnessed by Bailie Small; Mr. Porteous, and Mr. James Burn.

by the side of the fire. It was remarked, however, that twice or thrice he sighed heavily. At this time two of the magistrates were present, and were shortly after joined by the Rev. Messrs. Marshall and Porteous. The criminal and his spiritual assistants of the Catholic persuasion had, in the meantime, commenced their devotions, Burke apparently taking a fervent interest in these solemn preparations for his end. In the course of the religious exercise, the priest endeavoured to comfort his mind, and exhorted him to "confide in the mercy of God." This expression appeared to touch some peculiar chord of sympathy in the prisoner's breast, and drew from him a deep sigh, which seemed to bespeak some sudden and indescribable, though momentary, distraction of mind. In retiring to another apartment, he was accidentally met by the executioner, who stopt him rather unceremoniously, upon which he said, "I am not just ready for you yet." He was, however, followed by Williams, and returned shortly afterwards with his arms pinioned, but without any change in his demeanour. While the executioner was discharging this part of his duty, Burke made no remark, except to tell him that his handkerchief was tied behind. He was then offered a glass of wine, which he accepted, and drank "Farewell to all my *friends!*" and then entered into conversation for a few minutes with Mr. Marshall and Mr. Porteous. The magistrates, Bailies Crichton and Small, now appeared in their robes, with their rods of office, and the criminal took the opportunity, before he went forth to meet his doom, of expressing his gratitude to the magistrates, particularly to Bailie Small, for the kindness he had experienced from him, as well as from all the public authorities. He also made similar acknowledgments to Mr. Rose, the governor, Mr. Fisher, the deputy, and Mr. and Mrs. Christie, who have the charge of the Lock-up-house.

At eight o'clock, the procession left the Lock-up-house, and Burke walked to the scaffold with a firm step, but leaning on the arm of Mr. Reid. As soon as the officers by whom the culprit was preceded made their appearance at the head of Libberton's Wynd, *one loud and simultaneous shout was given by the crowd.* When he mounted the stair, it was with a step as if he were anxious to bring the tragedy to a conclusion; and having heard the shouts of the multitude, his presence of mind seemed to be disturbed a good deal, and he appeared to require more support than when he was walking from the Lock-up-house. When he was fairly upon the scaffold, loud and universal shouts and yells of *execration* burst from the spectators, and he cast a look of fierce and even desperate defiance at the multitude. He knelt immediately, and was engaged for a few minutes in his devotions, assisted by one of the Catholic priests. Mr. Marshall concluded the religious exercises by a short prayer. At the time when the culprit was observed to kneel, which he did with his back to the crowd, the shouts were repeated, with cries, to the persons on the scaffold, of "Stand out of the way!" "Turn him round!" &c. Signals were made to the crowd by the magistrates to intimate that Burke was engaged in his devotions; but these were totally disregarded, and the clamours continued. Besides the cries above noticed, shouts were heard of "Hare! Hare! bring out Hare!" "HANG KNOX!" "He's a *noxious* morsel!" When Burke rose from his knees, he lifted a

silk handkerchief upon which he had knelt, and put it with much care into his pocket; he then gave one single glance up to the gallows.

At ten minutes past eight, Burke took his place on the drop. While the executioner was adjusting the rope, one of the priests said to him, "Now say your creed; and when you come to the words 'Lord Jesus Christ,' give the signal, and die with his blessed name in your mouth." During all this time shouts were heard of, "Burke him!" "Give him no rope!" "Do the same for Hare!" "Weigh them together!" "*Wash blood from the land!*" &c. When the executioner was about to unloose his handkerchief, in order to adjust the rope, Burke said to him, "The knot's behind;" which were the only words he uttered on the scaffold. Precisely at a quarter past eight, Burke gave the signal, and amidst the most tremendous shouts, died almost without a struggle.

On the body being cut down, about five minutes before nine o'clock, another shout was sent forth by the multitude. There was evidently a great desire to get hold of the dead body, and the people were only restrained by the numerous body of police, aided by the strong barriers. A scramble took place among the assistants under the scaffold for portions of the rope, and knives and scissors were actively at work. Even a handful of shavings from the coffin was pocketed as a relic. Not the slightest accident of any kind occurred.

The body of Burke was removed, during the night, to Dr. Monro's class-room, and on Thursday it was in part dissected. The brain was the portion of the subject which was lectured upon; it was described as unusually soft; but peculiar softness is by no means uncommon in criminals who suffer the last punishment of the law. The anxiety to see the body was very great. A prodigious crowd collected at an early hour in the forenoon, and besieged the class-room door, eager to gain admission. The regular students were provided with tickets. It was with great difficulty, however, that these could be made available, even with the assistance of the police. Those having been accommodated who were entitled to admission, others were then admitted till the room was filled. The lecture began at one o'clock, and is usually over by two, but from the nature of the subject it was necessarily protracted, and did not terminate till after three. About half-past two o'clock, however, a body of young men, consisting chiefly of students, assembling in the area, and becoming clamorous for admission, which of course was quite impracticable, it was found necessary to send for a body of police to preserve order. But this proceeding had quite an opposite effect from that intended. Indignant at the opposition they met with, conceiving themselves to have a preferable title to admission, and exasperated at the display of force, the young men made several attempts, in which they had nearly succeeded, to overpower the police, and broke a good deal of glass in the windows on either side of the entrance to the anatomical theatre. The police were in fact compelled to use their batons; and several hard blows were exchanged on both sides. The Lord Provost was present for some time, but was glad to retire with whole bones, amidst the senseless hootings of the obstreperous youths, who lavished opprobrious epithets on the magistrates, particu-

cularly on Bailie Small, the College Bailie. This disturbance lasted from half-past two till nearly four o'clock, when an end was at once put to it by the good sense of professor Christison, who announced to the young men that he had arranged for their admission in parties of about fifty at a time, giving his own personal guarantee for their good conduct. This was received with loud cheers, and immediately the riotous disposition they had previously manifested, disappeared. Several of the more violent of the youths were taken into custody by the police, but were liberated on their parole by the magistrates. Several of the policemen, we regret to learn, were severely hurt, as also were some of the students. On Friday, an order was given to admit the public generally to view the body of Burke, and of course many thousands availed themselves of the opportunity thus afforded them. Indeed, so long as daylight lasted, a stream of persons continued to flow through the College Square, who, as they arrived, were admitted by one stair to the anatomical theatre, passed the table on which lay the body of the murderer, and made their exit by another stair. By these means no inconvenience was felt, except what was occasioned by the impatience of the crowd to get forward to the theatre. As if to preserve a uniformity in the disgusting details connected with this monster, it remains to be recorded that seven females pressed in among the rest of the crowd to view the corpse. They were roughly handled, and had their clothes torn by the male spectators.

PHRENOLOGICAL DEVELOPMENT OF BURKE.

MEASUREMENT.

	Inches.
Circumference of the head	22.1
From the occipital spine to lower Individuality	7.7
From the ear to lower Individuality	5.
From ditto to the centre of Philoprogenitiveness	4.8
From ditto to Firmness	5.4
From ditto to Benevolence	5.7
From ditto to Veneration	5.5
From ditto to Conscientiousness	5.
From Destructiveness to Destructiveness	6.125
From Cautiousness to Cautiousness	5.3
From Ideality to Ideality	4.6
From Acquisitiveness to Acquisitiveness	5.8
From Secretiveness to Secretiveness	5.7
From Combativeness to Combativeness	5.5

DEVELOPMENT.

Amativeness, very large. Philoprogenitiveness, full. Concentrativeness, deficient. Adhesiveness, full, Combativeness, large. Destructiveness, very large. Constructiveness, moderate. Acquisitiveness, large. Secretiveness, large. Self-esteem, rather large. Love of Approbation, rather large. Cautiousness, rather large. Benevolence, large. Veneration, large. Hope, small. Ideality, small. Conscientiousness, rather large Firmness, large. Individuality, upper, moderate. Do. lower, full. Form, full. Size, do. Weight, do.

Colour, do. Locality, do. Order, do. Time, deficient. Number, full. Tune, moderate. Language, full. Comparison, full. Causality, rather large. Wit, deficient. Imitation, full.

The above report, it may be necessary to observe, was taken a few hours after the execution. In consequence of the body having been thrown on its back, the integuments, not only at the back of the head and neck, but at the posterior lateral parts of the head, were at the time extremely congested; for in all cases of death by hanging, the blood remaining uncoagulated, invariably gravitates to those parts which are in the most depending position. Hence, there was a distension in this case over many of the most important organs which gave, for example, *Amativeness, Combativeness, Destructiveness, &c.* an appearance of size which never existed during life, and, on the other hand, made many of the moral and intellectual organs seem in contrast relatively less than they would otherwise have appeared. In this state, a cast of the head was taken by Mr. Joseph; but although for phrenological purposes it may do very well, yet no measurement, either from the head itself in that condition, or a cast taken from it, can afford us any fair criterion of the development of the brain itself. We know that this objection applies to the busts of all the murderers which adorn the chief pillars of the phrenological system; and in no case is it more obvious than in the present.

Our able professor, Dr. Monro, gave a demonstration of the brain to a crowded audience on Thursday morning; and we have, from the best authority, been given to understand, it presented nothing unusual in its appearance. We have heard it asserted that the lateral lobes were enormously developed, but having made inquiry on this subject, we do not find they were more developed than is usual. As no measurement of the brain itself was taken, all reports on this subject must be unsatisfactory; nor could the evidence of any eye-witness in such a matter prove sufficient to be admitted as proof either in favour of or against phrenology.

The question which naturally arises is, whether the above developments correspond with the character of Burke? It is not our intention to enter into any controversy on this subject; yet we cannot help remarking, that it may be interpreted, like all developments of a similar kind, either favourably or unfavourably for phrenology, as the ingenuity or prejudices of any individual may influence him. We have the moral organs more developed certainly than they ought to have been; but to this it is replied, that Burke, under the benign influence of these better faculties, lived upwards of thirty years, without committing any of those tremendous atrocities which have so paralyzed the public mind. He is neither so deficient in benevolence nor conscientiousness as he ought to have been, phrenologically speaking, and these organs, which modified and gave respectability to his character for as many as thirty years, all of a sudden cease to exercise any influence, and acquisitiveness and destructiveness, arising like two arch fiends on both sides, leave the state of inactivity in which they had reposed for so long a period, and gain a most unaccountable control over the physical powers under which they had for so many years succumbed. But, is the size of the organ of destructiveness in Burke

larger than it is found in the generality of heads?—and are his organs of benevolence and conscientiousness less developed than usual?

ANOTHER ACCOUNT.

Phrenology is the only science of mind which contains elements and principles capable of accounting for such a character as that before us; and it does so in a striking manner. We have seen a measurement and development of the head of Burke, taken by an experienced phrenologist from the living head; also a very accurate cast of the head with the hair shaven, taken by Mr. Joseph after the execution; and we have conversed with a medical gentleman who saw the brain dissected. The head was rather above than below the middle size. The middle lobe of the brain, in which are situate the organs of destructiveness, secretiveness, and acquisitiveness, was very large; at destructiveness, in particular, the skull presented a distinct swell, and the bone was remarkably thin.* The cerebellum, or organ of amativeness, was large; and Burke stated that, in some respects, his ruin was to be attributed to the abuses of this propensity, because it had led him into habits which terminated in his greatest crimes. The organs of self-esteem and firmness were also largely developed. It is mentioned in all the phrenological works, that self-esteem and acquisitiveness are the grand elements of selfishness. The anterior lobe, or that in which the intellect is placed, although small in proportion to the middle lobe, was still fairly developed, especially in the lower region, which is connected with the perceptive faculties. In accordance with this fact, Burke displayed acuteness and readiness of understanding. He could read and write with facility, and his conversation was pertinent and ready. The upper part of the forehead, connected with the reflecting organs, was deficient. The organ of ideality, which gives refinement and elevation, was exceedingly small; that of wonder, which prompts to admiration, is also deficient; and the organ of wit is small.

Here we find the organs, which, when abused, lead to selfishness, cruelty, cunning, and determination, all large; but we have still to account for the faculties which enabled him to act a better part in early life. Accordingly, combativeness is considerably inferior to destructiveness in size, and cautiousness is large. These, acting in combination with great firmness and secretiveness, would give him command of temper; and accordingly, it is mentioned that he was by no means of a quarrelsome disposition; but when once roused into a passion, he became altogether ungovernable—deaf to reason, and utterly reckless, he raged like a fury, and to tame him was no easy task; that is to say, when his large destructiveness was excited to such an extent that it broke through the restraints of his other faculties, his passion was elevated into perfect madness. Farther, looking at the coronal surface of the brain—the seat of the moral sentiments—we find it narrow in the anterior portion, but tolerably well elevated; that is to say, the organ of benevolence, although not at all equal in size to the organs

* This, as our readers will perceive, is the report which is contradicted, on the highest authority, in the preceding account. The thinness of the bone alluded to, we are also informed, was not peculiar to the skull of Burke, for it is found in that part to be attenuated in almost every skull.

of the animal propensities before mentioned, is fairly developed. Veneration and hope are also full; while conscientiousness is, in phrenological language, "rather full," or, in common speech, not remarkably deficient. Love of approbation also is full. In these faculties we find the elements of the morality which he manifested in the early part of his life; and also an explanation of the fact, remarked by all who saw him, that he possessed a mildness of aspect, and suavity of manner, which seemed in inexplicable contradiction with his cold-blooded ferocity. If there had been no kindness at all in Burke's nature, this expression would have been an effect without a cause.

The organ of Imitation is well developed; and it is mentioned in the phrenological works, that Secretiveness (which in him is likewise large), in combination with Imitation, produces the power of *acting*, or simulation. It is curious to observe, that Burke possessed this talent to a considerable extent. He stated, that he was fond of the theatre, and occasionally represented again the acting which he had seen. *He* also, and not Hare, was the *decoyer*, who, by pretended kindness, fawning, and flattery, or by *acting* the *semblance* of a friend, inveigled the victims into the den. This quality enabled him also to *act a part* in his interviews with the various individuals who visited him in jail. He showed considerable tact in adapting himself to the person who addressed him; and from the same cause it was sometimes difficult to discover when he was serious and when only feigning. His great Self-Esteem, Firmness, Cautiousness, and Secretiveness, produced that self-command, and unshaken composure, which never forsook him during his trial and execution.

One of the most striking tests of the degree in which the moral sentiments are possessed by a criminal, is the impression which his crimes make upon his own conscience when the deeds have been committed. In John Bellingham, who murdered Mr Perceval, the organ of Destructiveness is very large, while that of Benevolence is exceedingly deficient; and Bellingham could never be brought to perceive the cruelty and atrocity of the murder. Burke, in whom Benevolence is better developed, stated, that "for a long time after he had murdered his first victim, he found it utterly impossible to banish for a single hour the recollection of the fatal struggle—the screams of distress and despair—the agonizing groans—and all the realities of the dreadful deed. At night, the bloody tragedy, accompanied by frightful visions of supernatural beings, tormented him in his dreams. For a long time he shuddered at the thought of being alone in the dark, and during the night he kept a light constantly burning by his bedside." Even to the last, he could not entirely overcome the repugnance of his moral nature to murder, but mentioned that he found it necessary to deaden his sensibilities with whisky, leaving only so great a glimmering of sense as to be conscious of what he was doing. He positively asserted, that he could not have committed murder when perfectly sober.

Burke was considerably muscular, and in the cast with the hair shaven, taken after death, the measurement of destructiveness is two-eighths of an inch larger than the measurement taken during life, which must be abated in the estimate of the organ.

PHRENOLOGICAL DEVELOPMENT OF HARE.

We are happy to have it in our power to give, in addition to the above, the following report of the measurement of the atrocious Hare. It was taken the night before his acquittal from prison, and its accuracy may be confidently relied on.

MEASUREMENT.	Inches.
From the occipital Spine to lower Individuality	7.17-20ths.
From the Ear to lower Individuality	4.8
From ditto to the occipital Spine	4.3
From ditto to Philoprogenitiveness	5.
From ditto to Firmness	5.7
From ditto to Benevolence	5.4
From ditto to Causality	5.
From ditto to Comparison	5.4
Destructiveness to Destructiveness	5.19-20ths.
Secretiveness to Secretiveness	5.8
Acquisitiveness to Acquisitiveness	5.11-20ths.
Combativeness to Combativeness	5.7
Ear to Conscientiousness	4.5
Ideality to Ideality	5.4

DEVELOPMENT.

The organ of destructiveness is large in Hare, but certainly rather *below* than *above* the average size. The organ of acquisitiveness is also large, but its true development cannot be ascertained in consequence of the size of the temporal muscle, under which it lies. Secretiveness is large. Benevolence is well developed, in proportion to the size and figure of the head. Conscientiousness is full. Cautiousness is large. Combativeness is large. Ideality is very large. Causality is large. Wit is full.

The phrenologists and antiphrenologists draw very different deductions from the development of both of these murderers.

The antiphrenologists argue that destructiveness in Burke being rather below than above the average size, and benevolence decidedly large,—his character is at variance with these indications. The phrenologists reply, that destructiveness is certainly large, and as to his benevolence, he was until within the last few years really a benevolent man.

The antiphrenologists aver that Hare's destructiveness is not so large as they would *a priori* have anticipated, and his intellectual organs, causality, wit, and ideality, are so well developed as to be totally at variance with his acknowledged character. The phrenologists reply, that the coronal surface of the head is low and flat, and the anterior lobes of the brain very small; to which it is again rejoined, that this flat shape of head is very common, and it is impossible to ascertain by external inspection what is the proportional development of the cerebral lobes.

The antiphrenologists state that the organ of benevolence is in Hare well developed, which the phrenologists deny, referring to its distance from the ear, which is not so great in this instance as in Burke; to

which is retorted, that the head is broader, and it makes up in expansion what it wants in length.

The caution and secretiveness of both are large, to which the antiphrenologist replies, that these faculties did not predominate so much as is commonly believed in either of their characters.

Such are many of the arguments that have come within our own hearing, and we leave our readers to draw their own conclusions.

Mr. Combe's report will appear, we presume, in the Phrenological Journal, and the professed antiphrenologists of this city have not yet given theirs to the public.

HARE IN DUMFRIES!

(Abridged from the "Dumfries Courier.")

At a little past eight on Thursday night, Hare was released from the Calton-hill Jail, and after being muffled in an old camlet cloak, was conveyed by the head turnkey to Newington, where the two waited till the mail came up. He got safely seated on the top of the mail, and the tall man who came to see him off, exclaimed, when the guard said "all's right," "Good bye, Mr. Black, and I wish you well home!" At Noblehouse, when the inside passengers alighted and went into the Inn, Hare followed their example. At first, however, he sat down near the door, behind backs, with his hat on, and his cloak closely muffled about him. But this *backwardness* was ascribed to his modesty, and one of the passengers, by way of encouraging him, asked if he was not perishing with cold. Hare replied in the affirmative, and then moving forward, took of his hat, and commenced toasting his paws at the fire—a piece of indiscretion that can only be accounted for by his imbecility of character. And little indeed was the wretch aware that Mr. Sandford, advocate, one of the counsel employed against him in the prosecution at the instance of Daft Jamie's relations, was then standing almost at his elbow. When the guard blew his horn, the associate of Burke managed to be first at the coach-door, and as there happened to be one vacant seat, was allowed to go inside. But Mr. S., on coming forward, immediately discovered what had taken place, and though something was said about the coldness of the night, determinedly exclaimed, "Take that fellow out." Again, therefore, he was transferred to the top, and then Mr. S., to explain perhaps his seeming harshness, revealed to his fellow-travellers a secret which we devoutly wish he had kept. When the coach arrived in Dumfries, the news flew like wild-fire in every direction. We have already spoken of the crowd that had assembled shortly after eight o'clock, and by ten it had become perfectly overwhelming. The numbers of the people are estimated at 8000. It was known that Hare was bound to Portpatrick; and in the interim of more than four hours, that elapses between the arrival of the Edinburgh, and departure of the Galloway or Portpatrick mail, hundreds, if not thousands, were admitted to see him. It was deemed impossible to drive the mail along the High Street, when the time for her departure arrived, if Hare were either out or inside, with safety to any person connected with it. When it became generally known that Hare had not proceeded by the mail, group

after group continued to visit the monster's den. By these successive visitors, he was forced to sit or stand in all positions; and cool, and insensate, and apathetic as he seems, he was occasionally almost frightened out of his wits. Abuse of every kind was plentifully heaped on him. On one occasion he was menaced by a mere boy, while others urged him on and took his part, and at this time he became so much irritated, that he told them "to come on and give him fair play." A second time, when pressed beyond what he could bear, he took up his bundle and walked to the door, determined, as he said, to let the mob "tak' their will o' him." In this effort he was checked by a medical man.

During the whole forenoon, Mr. Fraser, the landlord, was apprehensive for the safety of his premises, and naturally anxious to eject the culprit who had rendered them so obnoxious. In fact, the whole town was so completely convulsed, that it was impossible to tell what would happen next; and in these circumstances, and after due deliberation on the part of our magistrates, who had a very onerous duty to perform, an expedient was hit on, and successfully executed, though the chances seemed ten to one against it.—Betwixt two and three o'clock, a chaise and pair were brought to the door of the King's Arms Inn, a trunk buckled on, and a great fuss made; and while these means were employed as a decoy duck, another chaise was got ready almost at the bottom of the back entry, and completely excluded from the view of the mob, if we except a posse of idle boys. The next step was to direct Hare to clamber or rather jump out of the window of his prison, and crouch like a cat along the wall facing to the stables, so as to escape observation. This part of his task was well executed; and the moment he got to the bottom and jumped into the chaise, the doors were closed, and the postilion drove off. The mob had become suspicious that a manœuvre of some kind was in the act of being executed, and hurried off in pursuit. At every little interval the chaise-driver was intercepted and threatened; and though Hare endeavoured to keep up the near pannel, and also cowered down to be out of harm's way, three stones were thrown at, and entered the chaise. The jailor had previously received his clew, and though a strong chain was placed behind the door, an opening was left to admit the fugitive; and into this gulf he leapt, hop-step-and-jump—a thousand times more happy to get into prison than the majority of criminals are to get out of it! His escape enraged the mob greatly, and the scene of action must now be shifted from the King's Arms Inn to the neighbourhood of the jail. As their numbers increased, they laid regular siege to this place of safety, preventing all ingress or egress, excepting at considerable personal risk. From four to eight o'clock, nothing but clamour and rioting were heard; and at nightfall they smashed and extinguished the nearest gas lamps, for reasons that may be easily enough conceived. Though the militia staff and police exerted themselves to the utmost, their numbers were inadequate to preserve proper order; and it was not till near eight o'clock, when a hundred special constables were sworn in, and appeared armed with batons on the spot, that the peace of the town was re-assured. Previous to this, nearly the whole front windows of the Court-house were smashed, as well as a few in an adjoining building. In spite of the noise occasioned

by the uproar and ceaseless hum of human voices, Hare was in bed and sound asleep. At one o'clock on Saturday morning the mob had dispersed, and Hare was roused, and ordered to prepare for his immediate departure. While putting on his clothes he trembled violently, and enquired eagerly for his cloak and bundle. But as these articles were not at hand, he was told that he must just go without them, and thank his stars into the bargain that he had a prospect of escaping with whole bones. As the whole population of Galloway were in arms, and as the mail had been surrounded and searched on Friday at Crocketford toll-bar, and probably at every other stage betwixt Dumfries and Portpatrick, he was recommended to take a different route, and being fairly put on the Annan road, he was left to his own reflections and resources. At three o'clock he was seen by a boy passing Dodbeck, and must have been beyond the Border by break of day, though a report was circulated on Saturday and Sunday, that he had been discovered at Annan, and stoned to death. But this mistake was corrected yesterday (Monday) by the driver of the mail, who reported that he saw him at a quarter past five on Saturday evening, sitting beside two stone-breakers on the public road, within half a mile of Carlisle. As the coach passed he held down his head, but the driver recognised him notwithstanding, as well as a gentleman who was on the top of the mail.—Since writing the above, we have learnt that Hare was seen on Sunday morning last, about two miles beyond Carlisle. He seemed to be moving onwards, trusting to circumstances, and without any fixed purpose, if we except the wretched one of prolonging, as long as possible, his miserable life.

(From the "Glasgow Chronicle" of Tuesday.)

The celebrated Mrs. Hare was this afternoon rescued from the hands of an infuriated populace by the Calton Police, and for protection is confined in one of the cells. She had left Edinburgh jail a fortnight ago, with her infant child, and has since been wandering the country incog. She states, that she has lodged in this neighbourhood four nights, with her infant and "her bit duds," without those with whom she lodged knowing who she was, and she was in hopes of quitting this vicinity without detection. For this purpose, she remained in her lodgings all day, but occasionally, early in the morning or at twilight, she ventured the length of the Broomielaw, in hopes of finding a vessel ready to sail to Ireland; but she has hitherto been disappointed. She went out this morning on the same object, and when returning, a woman, who she says was drunk, recognised her in Clyde Street, and repeatedly shouted, "Hare's wife; Burke her!" and threw a large stone at her. A crowd soon gathered, who heaped every indignity upon her; and with her infant child, she was pursued into Calton, where she was experiencing very rough treatment, when she was rescued by the police. She occasionally burst into tears while deploring her unhappy situation, which she ascribed to Hare's utter profligacy, and said all she wished was to get across the channel, and end her days in some remote spot in her own country, in retirement and penitence. The authorities, before releasing her, will probably make arrangements for procuring her a passage to Ireland. An immense

crowd surrounded the Calton Police Office this afternoon, in expectation of seeing the unhappy woman depart.

(From the "Edinburgh Evening Courant" of Saturday, Feb. 14.)

Hare's wife was sent down from Glasgow to Greenock, for the purpose of taking passage to Derry in the steam-boat for that port, which is at no great distance from her native place. In consequence, however, of the want of a bundle of clothes, which she could not get away with her, from being intercepted by the crowd, she was detained till Thursday, 12th February, about two o'clock, when she sailed in the Fingal for Belfast. While in Greenock, the police took her under their guardianship, and it was to but a few that she was known to have been in town till after her departure.

Popular Tumult—On Thursday, a number of people who had assembled about the Calton, were observed to come up Leith Street and pass along both the Bridges, southward, bearing an effigy of a certain Doctor, who has been rendered very obnoxious to the public by recent events. The figure was pretty well decked out in a suit of good clothes, and the face and head bore a tolerable resemblance to the person intended to be represented. On the back was a label bearing the words "Knox, the associate of the infamous Hare." In passing along the South Bridge a policeman, a resolute fellow, attempted singly to stem the torrent and pull the figure from those carrying it, but failed, receiving some severe blows for his boldness. The crowd, which increased rapidly, proceeded onward to Newington, where the figure was suspended by the neck from a tree, fire being also put to it, but which soon went out. The figure was then torn to pieces amidst the loud huzzas of thousands. Up to this period no actual violence had been committed, but the appearance of the crowd was very threatening, the whole flower-plot and railing in front of the Doctor's house being literally packed with people, who were shouting in a wrathful manner—blending the names of the West Port murderers with that of the medical gentleman so often alluded to, as connected with these horrid transactions. Captain Stewart, the Superintendent of the Police, and a superior officer of another department of the establishment, having out-run the main body of watchmen, and having got admission to the house from the rear, made a determined charge from the front door upon the crowd, who instantly retreated to the road and commenced throwing stones, whereby Mr. Stewart and the other gentleman were considerably injured; but no farther rioting then took place, and no property was destroyed beyond a pane or two of glass broken. This mob, which may be said to have consisted principally of boys and young lads, among whom eight or ten bakers seemed the most active, quietly dispersed, but re-assembled in different parts of the city. A crowd, mostly boys, assembled in Prince's Street, and, armed with sticks, paraded the High Street, but did no mischief, having encountered a body of the police at the Tron Church, by whom they were dispersed. Another mob collected in the West Port, came down the Grassmarket and Cowgate, and went up the Horse Wynd, breaking a number of panes of glass in the windows on the west and

south sides of the College. A third crowd had collected about the Cowgate, where several of the most active were apprehended. But, notwithstanding all the efforts of the police, the mob again attacked the house of Dr. Knox about seven o'clock, when a great number of windows were broken, both in his house and those adjoining. An attempt was also made on Surgeon Square, but a party of police, under the direction of Mr. Kerr, completely repelled the attack. Upon the whole, the police never appeared more vigilant or more successful in preserving the peace. They apprehended about twenty of the most active, who are to be brought before the sitting magistrate to-day.

From the "Edinburgh Weekly Chronicle."

Since the grand spectacle of the execution of Dr. Knox in effigy was exhibited, about twenty-three of those concerned in it have been fined in sums of from 5s. to 40s. We understand that all these have been defrayed out of a stock purse previously collected. Some of the rioters had large quantities of gunpowder upon them. Another *auto da fe* is meditated; on which occasion, the cavalcade will move in the direction of Portobello, where, it is supposed, the Doctor burrows at night. As we said before, *the present agitation of public feeling will never subside until the city be relieved of this man's presence, or until his innocence be manifested.* IN JUSTICE TO HIMSELF, IF HE IS INNOCENT—IN JUSTICE TO THE PUBLIC, IF HE IS GUILTY,—HE OUGHT TO BE PUT UPON HIS TRIAL. The police have a duty to perform, and it gives us pleasure to learn that they discharge it with promptitude; but the feelings of nature, when outraged as they have been in an immeasurable degree, will soar superior to all technicalities. It scarcely ever was known that a populace ventured upon acts of wild and irregular justice, when there was not extreme official apathy.

From the "Edinburgh Evening Courant" of Sat. 14th Feb. 1829.

HARE.—We understand that an investigation is now going on in this city, relative to a murder committed some time since in Shields, in a manner, it is supposed, similar to the West Port murders; and the object of the inquiry is said to be to ascertain whether Hare or Burke were in Edinburgh at the time the crime was committed. A story has been in circulation, but which we have not been able to trace to an authentic source, that Hare had been apprehended in Newcastle on the above charge. It is possible he may have reached Newcastle and been taken into custody; but from his being in the vicinity of Carlisle so late as Tuesday last, it is probable the report is without foundation.

The Edinburgh Murders.—Some of our contemporaries affect to be shocked at the shouts of disgust and horror against the miscreant *Burke* which broke from the excited populace of Edinburgh while witnessing the legal retribution for his crimes. We are more shocked at that sickly and sickening pretence to fine feeling by these newspapers. *The exclamations of the Scotch were ebullitions of virtuous*

and honest resentment against the perpetrator of cruelties unheard of: we honour them for it; they proved themselves to be unsophisticated men.—*Times.*

The extraordinary sensation created by *Burke's* atrocities caused a display of feeling on the part of the populace while the last dreadful ceremonies were in progress, similar to that witnessed in England when the wretched Jonathan Wild, and when the cruel Brownriggs suffered at Tyburn. In that awful hour, when the sword of justice is about to descend on the devoted sinner, it were to be wished that no clamorous shouts of abhorrence, or of sympathy, should interrupt the parting prayer which would fit the crime-stained spirit for its passage; but certainly, if any excuse can be offered for exulting over the dying agonies of a victim, it is furnished by the extraordinary guilt of the sufferer in the present case.—*Sunday Times.*

JAMES GRAY'S ACCOUNT OF HIMSELF.

"I was born on the 1st day of January 1783, in the Grassmarket of Edinburgh,—leaving me exactly forty-six years of age last New Year's Day. My father kept a public-house, the same now possessed by Mr. Porteous, victual-dealer; and at present there are now residing in Edinburgh several very respectable people who were intimately acquainted with him.

"My brother, who had served his time with Messrs. William and Peter Cunningham, jewellers, having completed his apprenticeship, set up in company with a Mr. Sinclair on the North Bridge. To this brother I was sent to learn his trade. In the course of a short time my brother told my mother that if he had set up in some other town, he could have done much better, as his acquaintance were the means of often drawing him from his work, and signified his intention of removing to Glasgow, which was immediately complied with, and whither I went with him. However, before leaving Edinburgh, he had contracted an intimacy with a Miss Scrymgeour, which was kept up by letter for, I think, half a year, when he set out for Edinburgh on purpose to get married, leaving me in charge of the shop. We had at that time one journeyman: and the very day appointed to celebrate the nuptials, he was dressed in a winding-sheet. I was at this time but young, and quite unable to manage a shop. My father in a short time arrived in Glasgow, and brought me and every thing belonging to the shop to Edinburgh; after which time I was sent to a Mr. Mackenzie, a jeweller, to learn the trade. He was bereaved of reason in a short time, and the shop shut. I then enlisted in the Elgin Fencibles: in the course of two years joined the 72d regiment, when I went abroad; and for the course of seventeen years it was unknown to my parents where I was. My other brother, however, had, at the expiration of that time, found me out, and wrote to me, informing me of the death of my parents. On the 14th day of October, arrived in Edinburgh from Aberdeen. I saw Burke for the first time in my life on the 24th October—parted with him on the High Street. I

again saw him in his own house on Sunday the 26th, at which time I was invited to remain at his house. Mrs. Burke went in company with my wife to Henry M'Donald's, our former lodgings, and paid ninepence, which we were at that time due for lodging, and removed our small effects to Burke's house. Nothing transpired above common until Friday, when Burke brought in an old woman: my wife was at the time making some porridge for breakfast: he said, Give this woman her breakfast; but she said she could take none before twelve o'clock, she being a *Catholic*, and the day being Friday. In the course of conversation, Burke said he had discovered the old woman was a relation of his mother's. I was present all the time; but as the conversation was sometimes in Irish, I could not join in it excepting when they spoke English."

(As the remainder of this account already appears in the evidence given on the trial, it is not necessary to quote farther.)

(Signed) "JAMES GRAY."

Notes taken during a Conversation with James Gray.

Helen Dougal *(Burke's Paramour)*, not M'Dougal, was born at Middistone *(near Falkirk)*. Gray's wife's name is Ann M'Dougal, and she was born at the same place.

Burke was very kind in treating Gray and his wife, which Gray imputed to his wife being a town's-woman of Burke's wife, and Helen Dougal having had two children by Gray's wife's father; but has now every reason to think that Burke had an intention of making Gray and his wife victims also.

Almost every day, not less then ten or twelve bottles of liquor were brought into Burke's house, and when he was treating Gray with drink, Burke never used the common dram glass, but generally used a strong ale glass, the contents of which he swallowed as with avidity, and not content with what was brought into the house, he frequently went into Rymer's shop to drink.

Burke never took Gray to M'Kenzie's but twice: the first time Gray's wife and Helen Dougal were there, when they had half a mutchkin of whisky. The second time only Gray, his wife, and Burke, were present: this was on the Saturday about two o'clock, when the dead body was in the house, when Burke, instead of taking the spirits, took a glass of *vinegar*, which Gray had never seen him do before.

Burke seemed to be always flush of money, which Gray at first considered he might have made by his occupation in mending and selling old shoes, &c.; but he never saw him do any thing in this way that could furnish him so plentifully: during the five days Gray remained in his house, he only mended one pair of shoes.

Never saw any strange man at Burke's during this time, except Hare; but Mrs. Gray says she has seen Mr. Paterson's sister calling.

When Gray and his wife discovered the dead body, Mrs. Lawrie's servant girl, with a child in her arms, was just going out of Burke's house, and they did not think it proper to give any alarm by calling her back.

On discovering the body, Gray went immediately to Mackenzie's, and requested him to keep a few articles for him till the evening. Burke had also let him know that he could not sleep there that night, but for what purpose he does not know, except that it might be for the purpose of removing the body.

Went back to Burke's; found Dougal and his wife; came out of the house, Dougal following Gray; met in the street Hare and his wife; and the latter asked what was the matter—why they were making such a noise in the street? and asked Gray to go to Mr. Spalding's and take a dram, and settle the matter. While there, it came out from Mrs. Hare, that Burke's wife had told her that they had discovered the dead body. Hare did not go into this house.

Went from this house and carried away his child's clothes from Hare's, and on leaving them at his present lodgings, he went immediately to the police, and gave information.

About a fortnight after Burke was committed, Hare's servant girl came to Gray, and said that in consequence of her having been in Hare's employ, she was afraid she would not get into any service, and requested him to write to the sheriff in her favour, which he did, but without effect. She said to Gray that she could tell a great many things if she liked, but only mentioned one instance, and that was of an old woman (Grannie, she called her, if he remembers right,) being carried by Hare from his kitchen into the cellar, while in a state of intoxication, but she never knew what became of her afterwards. She did not mention at what time this took place. The servant's name is Betty Main. She was in the witness-room during the trial, but was not called on.

On the afternoon of Friday, Hare's wife came into Burke's house and found the old woman Docherty sitting on the chair intoxicated, and gave her a glass of whisky, at two or three different times, and she refusing to take it, she poured it into her mouth and put her hand upon her mouth, to force her to swallow it.

The wound the old woman (Docherty) received in her foot was from striking it against Mrs. Conway's fender, when she came in to light her pipe. This wound was the cause of Mrs. Conway's swearing to the identity of the dead body in the police-office; she said if such a wound was found (describing the part), then she could positively swear to the body being Docherty's.

What excited Mrs. Gray's suspicions was Burke and Dougal's not allowing her to clean the house. Mrs. G. then thought they had stolen goods concealed among the straw; and she said to Gray that she would see to it. This put them on the search for the body, when Broggan and Dougal went out. 'Now,' says Mrs. Gray, 'I will see the mystery.'

Burke generally came home about ten, eleven, or twelve o'clock at night, and always accompanied by a policeman from off the station; and had also a bottle of whisky to treat him with every night. The policeman generally stopped a few minutes, and always took one or two glasses. (It is hoped the proper authorities will investigate this.)

FINIS.

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